152 U.S. 355

809

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 903.

ABBIE A. ISRAEL, PLAINTIFF IN ERROR,

vs.

JAMES B. ARTHUR, ADMINISTRATOR, &c.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED MARCH 11, 1893.

(15,273.)

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1 *Writ of Error to — Court U. S., District of Colorado.*

THE UNITED STATES OF AMERICA:

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

The President of the United States to the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, between Abbie A. Israel, plaintiff in error, and James B. Arthur, administrator, etc., defendant in error, a manifest error hath happened, to the great damage of the said Abbie A. Israel, plaintiff in error, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together this writ, so that you have the same at Washington, D. C., on the 20th day of March next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of February, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the 117th year.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY, *Clerk.*

Allowed by—
CHARLES D. HAYT,
Chief Justice Supreme Court of Colorado.

2 [Endorsed:] Filed in supreme court Feb. 18, 1893. James A. Miller, clerk.

Return.

THE UNITED STATES OF AMERICA, *State of Colorado,* } ss:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said supreme court, at Denver, in said State, this 18th day of February, 1893.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk Supreme Court of Colorado.

3 *Citation, N. S. — Court.*

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to James B. Arthur, administrator, etc., Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the 20th day of March next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein Abbie A. Israel is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles D. Hayt, chief justice of the supreme court of the State of Colorado, this 18th day of February, in the year of our Lord one thousand eight hundred and ninety-three.

CHARLES D. HAYT,
Chief Justice of the Supreme Court of the State of Colorado.

4 [Endorsed:] Filed in supreme court Feb. 18, 1893. James A. Miller, clerk.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

On this 20th day of February, A. D. 1893, personally appeared Edward M. Cooke before me, the subscriber, a clerk of the supreme court of the State of Colorado, and *makes* oath that he delivered a true copy of the within citation to E. A. Ballard, attorney of said defendant in error, James B. Arthur, at the city of Denver, Colorado, on the date first aforesaid.

EDWARD M. COOKE.

Sworn to and subscribed before me this 20th day of February, A. D. 1893.

[Seal Supreme Court, State of Colorado.]

JAMES A. MILLER,
Clerk Supreme Court Colorado.

DENVER, COLO., *Feb'y 27th,* 1893.

I hereby accept service of a copy of the citation and enter the appearance of the defendant in error, James B. Arthur, adm., &c., herein.

V. D. MARKHAM,
Attorney for James B. Arthur, Adm., Def't in Error.

5 In the Supreme Court of the United States.

ABBIE A. ISRAEL, Plaintiff in Error,
vs.
JAMES B. ARTHUR, Administrator, etc., Defendant in Error.
} Error to the Supreme Court of the State of Colorado.

Assignment of Errors.

Now comes the said Abbie A. Israel, plaintiff in error, by T. J. O'Donnell and W. S. Decker, her attorneys, and says that in the record, proceedings, and judgment aforesaid there is manifest error, in this, to wit:

I.

That said judgment is in violation of the fourteenth amendment to the Constitution of the United States, in that it is the taking of property without due process of law.

a. That said prosecution was without indictment or information.

b. In a court without jurisdiction to try such an offense.

c. That she was condemned or convicted and her property forfeited without a trial by jury.

d. That the trial was had in a county other than that in which the offense is alleged to have been committed.

e. That the right to be present at the trial and be confronted with the witnesses for the prosecution *were* denied the plaintiff in error.

6 II.

That said judgment is in violation of section 1 of article X of the Constitution of the United States, in this:

a. That it provides for the offense of adultery or bigamy another, different, and additional punishment to those which the law provided should be inflicted.

b. That the said judgment has the same effect as a bill of pains and penalties, which is included in the general designation of a bill of attainder, prohibited by said section.

Wherefore said plaintiff in error prays that said judgment of the supreme court of the State of Colorado may be reversed, etc.

T. J. O'DONNELL,
W. S. DECKER,
Attorneys for Plaintiff in Error.

7 STATE OF COLORADO:

In the Supreme Court.

Pleas before the supreme court of the State of Colorado on the 17th day of January, A. D. 1893, said day being one of the juridical days of the January, A. D. 1893, term of said supreme court.

Present: Honorable Charles D. Hayt, chief justice; Honorable Victor A. Elliott, Honorable Luther M. Goddard, justices; Eugene

Engley, Esq., attorney general; F. A. Richardson, Esq., bailiff; James A. Miller, clerk.

8 STATE OF COLORADO, } ss:
Larimer County, }

In the County Court of Larimer County for Probate Business.

In the Matter of the Estate of JOHN ARTHUR, Deceased:

To the Hon. Thos. M. Robinson, county judge and judge of said court:

Your petitioner, Abbie A. Arthur, represents and shows to your honor—

First. That the said John Arthur departed this life on or about the 16th day of April, A. D. 1878, intestate, leaving no child and no decendants of any child of his, but leaving your petitioner, his wife up to the time of his death and now his widow, to whom his estate descended and in whom it vested, as her absolute estate, subject to the payment of his debts.

Second. That on the 23rd day of April, A. D. 1878, James B. Arthur presented his petition to the judge of said court for letters of administration, wherein he did allege that said John Arthur left him surviving one brother (said James B. Arthur) and four children of a sister deceased, and thereby ignored the relationship of your petitioner to said decedent and her right to his estate.

Third. That, although appointed administrator of said estate on the day and year last aforesaid, said James B. Arthur did not present or exhibit to said court or the judge thereof any account of his acts and doings as such administrator until the 27th day of October, A. D. 1879.

9 Fourth. That on the day and year last aforesaid said administrator exhibited to said court a report of his acts and doings as such administrator, from which report it appeared that the total amount received by him from sales of the personal estate of said decedent was $23,857.00, and the total amount paid out was $3,034.33, leaving a balance in his hands of $20,822.67, as by said report now on file will more fully appear.

Fifth. And your petitioner shows that said administrator filed no vouchers for the payments and disbursements claimed to have been made by him in said report nor presented any such vouchers to the judge of said court, as your petitioner is informed and believes, nor has said administrator filed or presented to said court or any judge thereof any sale bill or bills showing when and to whom personal property represented in said report was sold or the amount or price each article sold for, as required by statute; that no order has ever been made by said court or the judge thereof allowing said administrator to sell the personal property of said estate or any part thereof at private sale.

Sixth. And your petitioner is informed and believes and so alleges the facts to be—

1st. That said administrator did sell all of the personal property of said estate which was sold at private sale, but that much of said personal property represented by him to have been sold for cash, per said report, was not sold at all, but, on the contrary, the same was taken by himself and converted to his own use at the appraised value, per appraisement bill, and such property so taken by him was worth much more than so appraised.

10 2nd. That the great bulk of said personal property consisted of cattle, and the same were represented in said report as sold for twenty-three thousand dollars ($23,000) cash.

3rd. Whereas said cattle were not sold for cash, but in payment therefore said administrator took and received the notes of good and responsible parties, bearing interest at the rate of twelve per cent. per annum and payable to his own order, and not to him as administrator of said estate.

4th. That at the time said administrator made and filed said report he held and was possessed of said notes bearing interest as aforesaid.

5th. That said administrator kept and held said notes until some time in the year A. D. 1880, when he went to Oregon or Idaho or some other far-off State or Territory and purchased a large herd of about two thousand cattle, and in payment therefor used said notes or the proceeds thereof.

6th. That said administrator caused said cattle to be removed into Wyoming Territory, where they now are, save such as he has already disposed of at great profit.

7th. That with the money and means aforesaid said administrator has acquired a valuable herd of cattle, which he now holds and claims as his own individual property.

Seventh. That from the date of filing the report last aforesaid up to the 27th day of December, A. D. 1880, said administrator neglected and failed to exhibit to said court or the judges thereof any account of his acts and doings as administrator of said estate.

11 Eighth. That on the day and year last aforesaid said administrator filed in said court a report of his acts and doings as such in respect to expenses incurred and labor performed in the settlement of said estate; also credits for which he claims allowance, and therein represented that he had received the total sum of $23,867.00 and paid out the sum of $4,778.18, leaving a balance due of $19,079.82, as by said report now on file will more fully appear, it appearing by said report that the whole amount of said sum claimed to have been paid out was for expenses, services, and commissions in his management of said estate; that said administrator represented in said report or account that it contained a full and correct account of all his acts, dealings, and transactions, and of all moneys and effects received and paid out by him as such administrator from his appointment to the 7th day of December, A. D. 1880, and made his former report a part thereof.

Ninth. And your petitioner is informed and believes and so alleges the facts to be—

(1.) That said administrator had theretofore received and collected moneys and choses in action belonging to said estate of which no mention is made in said report; nor does said administrator mention or account for in either of said reports the large amount of interest or any amount of interest which had accrued upon the aforesaid notes taken by him in payment of said cattle as aforesaid, which said interest he had theretofore received, but the exact amount of which your petitioner is not informed and cannot state.

(2.) That the then judge of said court, without being advised of the matters aforesaid and the interest and collections made
12 and received by said administrator and not accounted for by him, did approve said report improvidently and without due consideration or notice or opportunity to your petitioner or any person interested in said estate to oppose the same, and forgetting that he had as such judge promised and agreed to notify parties claiming interest in said estate of any action or proceedings therein upon that day.

(3.) That said administrator from that time until now has failed and neglected to exhibit to said court or the judge thereof any further account of his acts and doings as such administrator and has continued to use and enjoy the property and effects of said estate, as hereinbefore set forth.

(4.) That said administrator has removed himself from the State of Colorado and gone to Wyoming Territory, where he now is attending to said herd of cattle.

Tenth. That said James B. Arthur, Joseph Jessup, Mary A. Jessup, James Jessup, Nancy J. Kerming, Richard C. Arthur, William Arthur, Grace Arthur Diena, and Rosetta Arthur, as brothers and sisters and de-cendants of a deceased sister of said John Arthur, deceased, have claimed, by virtue of such relationship, to be entitled to a share each in said estate as distributees and heirs-at-law of said decedent, and who are all without the State of Colorado, as your petitioner is informed and believes, and their last known post-office addresses were as shown by exhibit hereto annexed marked "A."

And your petitioner further shows that said administrator has caused notice to claimants (creditors) to be duly published and that no claims have been presented or allowed against said estate, although the time expired for so doing more than a year last past.

13 To the end, therefore, that your petitioner may be duly declared and adjudged the sole distributee of said estate and heir-at-law of said John Arthur, deceased, and that said administrator may be required to fully and speedily account for and pay and turn over all the personal property of said estate to your petitioner, your petitioner humbly prays—

1st. For an order fixing some certain time when proof of heirship in said estate shall be made and causing due notice thereof to be given to all persons concerned.

2nd. That immediately upon the proof of heirship in said estate said administrator be required to pay over to your petitioner the

amount of money now acknowledged by said administrator to be in his hands belonging to said estate.

3rd. To cite and require said administrator to be and appear before this honorable court within some short time, to be fixed, and particularly and in detail answer each and every allegation in this petition and make full and complete disclosure as to each and every matter in the same alleged and enquired about herein and submit to oral examination before this court or the judge thereof touching the same.

4th. That this honorable court will set aside and revoke the orders heretofore made by the judge of this court approving the accounts of said administrator and order and require said administrator to reaccount for all the matters pertaining to said estate and his acts and doings therein, and produce and submit to the judge of this court complete and accurate sale bills showing when, where, how, and to whom all property of said estate was sold by
14 him and the price for which each article was sold, and also submit proper vouchers for all disbursements made by him as such administrator.

5th. Upon a full accounting of all of said personal estate, including the profits acquired and derived by said administrator from the use of the funds and property belonging to said estate, he be required to pay and turn over to your petitioner such sum or sums of money and such property as may be undisposed of as shall belong to said estate and so to your petitioner as the sole owner thereof.

6th. That your honor will make such further and other orders as shall be necessary and expedient to fully and finally administer upon said estate and grant to your petitioner such further relief as shall to your honor seem meet.

ABBIE A. ARTHUR, *Petitioner*,
By HAYNES, DUNNING & HAYNES,
Her Attorneys.

HAYNES, DUNNING & HAYNES,
Petitioner's Attorneys.

EXHIBIT "A," Referred to in said Petition.

James B. Arthur's last P. O. address, Greeley, Colorado.
Joseph Jessup's " " " " Parker, Butler Co., Penn.
James Jessup's " " " " Cincinnati, Ohio.
Mary A. Jessup's " " " " Allegheny City, Penn.
Nancy J. Kerming's " " " " Allegheny City, Penn.
William A. Arthur's " " " " Pittsburg, Penn.
Rosetta Arthur's " " " " " "
Grace Arthur Diena's last P. O. address, " "
Richard C. Arthur's " " " " " "

In care of K. McIntosh, at No. 155 Fourth Ave., Pittsburgh, Penn., and also said Richard C. Arthur's at Rosedale, Wyandotte Co., Kans.

ABBIE A. ARTHUR,
By HAYNES, DUNNING & HAYNES.

(1.) That said administrator had theretofore received and collected moneys and choses in action belonging to said estate of which no mention is made in said report; nor does said administrator mention or account for in either of said reports the large amount of interest or any amount of interest which had accrued upon the aforesaid notes taken by him in payment of said cattle as aforesaid, which said interest he had theretofore received, but the exact amount of which your petitioner is not informed and cannot state.

(2.) That the then judge of said court, without being advised of the matters aforesaid and the interest and collections made
12 and received by said administrator and not accounted for by him, did approve said report improvidently and without due consideration or notice or opportunity to your petitioner or any person interested in said estate to oppose the same, and forgetting that he had as such judge promised and agreed to notify parties claiming interest in said estate of any action or proceedings therein upon that day.

(3.) That said administrator from that time until now has failed and neglected to exhibit to said court or the judge thereof any further account of his acts and doings as such administrator and has continued to use and enjoy the property and effects of said estate, as hereinbefore set forth.

(4.) That said administrator has removed himself from the State of Colorado and gone to Wyoming Territory, where he now is attending to said herd of cattle.

Tenth. That said James B. Arthur, Joseph Jessup, Mary A. Jessup, James Jessup, Nancy J. Kerming, Richard C. Arthur, William Arthur, Grace Arthur Diena, and Rosetta Arthur, as brothers and sisters and de-cendants of a deceased sister of said John Arthur, deceased, have claimed, by virtue of such relationship, to be entitled to a share each in said estate as distributees and heirs-at-law of said decedent, and who are all without the State of Colorado, as your petitioner is informed and believes, and their last known post-office addresses were as shown by exhibit hereto annexed marked "A."

And your petitioner further shows that said administrator has caused notice to claimants (creditors) to be duly published and that no claims have been presented or allowed against said estate, although the time expired for so doing more than a year last past.

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2nd. That immediately upon the proof of heirship in said estate said administrator be required to pay over to your petitioner the

amount of money now acknowledged by said administrator to be in his hands belonging to said estate.

3rd. To cite and require said administrator to be and appear before this honorable court within some short time, to be fixed, and particularly and in detail answer each and every allegation in this petition and make full and complete disclosure as to each and every matter in the same alleged and enquired about herein and submit to oral examination before this court or the judge thereof touching the same.

4th. That this honorable court will set aside and revoke the orders heretofore made by the judge of this court approving the accounts of said administrator and order and require said administrator to reaccount for all the matters pertaining to said estate and his acts and doings therein, and produce and submit to the judge of this court complete and accurate sale bills showing when, where, how, and to whom all property of said estate was sold by
14 him and the price for which each article was sold, and also submit proper vouchers for all disbursements made by him as such administrator.

5th. Upon a full accounting of all of said personal estate, including the profits acquired and derived by said administrator from the use of the funds and property belonging to said estate, he be required to pay and turn over to your petitioner such sum or sums of money and such property as may be undisposed of as shall belong to said estate and so to your petitioner as the sole owner thereof.

6th. That your honor will make such further and other orders as shall be necessary and expedient to fully and finally administer upon said estate and grant to your petitioner such further relief as shall to your honor seem meet.

ABBIE A. ARTHUR, *Petitioner*,
By HAYNES, DUNNING & HAYNES,
Her Attorneys.

HAYNES, DUNNING & HAYNES,
Petitioner's Attorneys.

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William A. Arthur's " " " " Pittsburg, Penn.
Rosetta Arthur's " " " " " "
Grace Arthur Diena's last P. O. address, " "
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In care of K. McIntosh, at No. 155 Fourth Ave., Pittsburgh, Penn., and also said Richard C. Arthur's at Rosedale, Wyandotte Co., Kans.

ABBIE A. ARTHUR,
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(1.) That said administrator had theretofore received and collected moneys and choses in action belonging to said estate of which no mention is made in said report; nor does said administrator mention or account for in either of said reports the large amount of interest or any amount of interest which had accrued upon the aforesaid notes taken by him in payment of said cattle as aforesaid, which said interest he had theretofore received, but the exact amount of which your petitioner is not informed and cannot state.

(2.) That the then judge of said court, without being advised of the matters aforesaid and the interest and collections made
12 and received by said administrator and not accounted for by him, did approve said report improvidently and without due consideration or notice or opportunity to your petitioner or any person interested in said estate to oppose the same, and forgetting that he had as such judge promised and agreed to notify parties claiming interest in said estate of any action or proceedings therein upon that day.

(3.) That said administrator from that time until now has failed and neglected to exhibit to said court or the judge thereof any further account of his acts and doings as such administrator and has continued to use and enjoy the property and effects of said estate, as hereinbefore set forth.

(4.) That said administrator has removed himself from the State of Colorado and gone to Wyoming Territory, where he now is attending to said herd of cattle.

Tenth. That said James B. Arthur, Joseph Jessup, Mary A. Jessup, James Jessup, Nancy J. Kerming, Richard C. Arthur, William Arthur, Grace Arthur Diena, and Rosetta Arthur, as brothers and sisters and de-cendants of a deceased sister of said John Arthur, deceased, have claimed, by virtue of such relationship, to be entitled to a share each in said estate as distributees and heirs-at-law of said decedent, and who are all without the State of Colorado, as your petitioner is informed and believes, and their last known post-office addresses were as shown by exhibit hereto annexed marked "A."

And your petitioner further shows that said administrator has caused notice to claimants (creditors) to be duly published and that no claims have been presented or allowed against said estate, although the time expired for so doing more than a year last past.

13 To the end, therefore, that your petitioner may be duly declared and adjudged the sole distributee of said estate and heir-at-law of said John Arthur, deceased, and that said administrator may be required to fully and speedily account for and pay and turn over all the personal property of said estate to your petitioner, your petitioner humbly prays—

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amount of money now acknowledged by said administrator to be in his hands belonging to said estate.

3rd. To cite and require said administrator to be and appear before this honorable court within some short time, to be fixed, and particularly and in detail answer each and every allegation in this petition and make full and complete disclosure as to each and every matter in the same alleged and enquired about herein and submit to oral examination before this court or the judge thereof touching the same.

4th. That this honorable court will set aside and revoke the orders heretofore made by the judge of this court approving the accounts of said administrator and order and require said administrator to reaccount for all the matters pertaining to said estate and his acts and doings therein, and produce and submit to the judge of this court complete and accurate sale bills showing when, where, how, and to whom all property of said estate was sold by
14 him and the price for which each article was sold, and also submit proper vouchers for all disbursements made by him as such administrator.

5th. Upon a full accounting of all of said personal estate, including the profits acquired and derived by said administrator from the use of the funds and property belonging to said estate, he be required to pay and turn over to your petitioner such sum or sums of money and such property as may be undisposed of as shall belong to said estate and so to your petitioner as the sole owner thereof.

6th. That your honor will make such further and other orders as shall be necessary and expedient to fully and finally administer upon said estate and grant to your petitioner such further relief as shall to your honor seem meet.

ABBIE A. ARTHUR, *Petitioner*,
By HAYNES, DUNNING & HAYNES,
Her Attorneys.

HAYNES, DUNNING & HAYNES,
Petitioner's Attorneys.

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James B. Arthur's last P. O. address, Greeley, Colorado.
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James Jessup's " " " " Cincinnati, Ohio.
Mary A. Jessup's " " " " Allegheny City, Penn.
Nancy J. Kerming's " " " " Allegheny City, Penn.
William A. Arthur's " " " " Pittsburg, Penn.
Rosetta Arthur's " " " " " "
Grace Arthur Diena's last P. O. address, " "
Richard C. Arthur's " " " " " "

In care of K. McIntosh, at No. 155 Fourth Ave., Pittsburgh, Penn., and also said Richard C. Arthur's at Rosedale, Wyandotte Co., Kans.

ABBIE A. ARTHUR,
By HAYNES, DUNNING & HAYNES.

15 (Endorsed:) County court of Larimer county. In the matter of the estate of John Arthur, deceased. Petition of Abbie A. Arthur. Filed May 17th, 1881. T. M. Robinson, judge. Haynes, Dunning & Haynes, att'ys for pet'r.

STATE OF COLORADO, }
Larimer County. }

In the County Court, Sitting as a Court of Probate.

In the Matter of the Estate of JOHN ARTHUR, Deceased.

The Answer of James B. Arthur to the Petition of Abbie A. Israel, Formerly Abbie A. Arthur.

Said administrator denies that said petitioner up to or at the time of the death of said John Arthur was the wife of said John Arthur; denies that she is now or ever was the widow of said John Arthur; denies that the estate of said John Arthur descended to or vested in the petitioner; admits the rendition of the accounts in the said petition mentioned; denies that he filed no vouchers for the payments and disbursements claimed in said accounts and reports to have been made by him; denies that he did not present to the court and judge sale bills for the property sold; avers that all sales, payments, and disbursements made by him were made with the cognizance of the then judge of this honorable court and the same were at the time or afterwards approved by said court and the judge thereof.

Avers that in everything done by said administrator he at the time acted by consent and approval of the only persons then or at any time known or believed by him to be heirs-at-law or distributees of said John Arthur.

16 Denies that he ever converted any portion of said estate or the personal property pertaining thereto to his own use.

Denies that he at any time received or collected monies or choses in action belonging to said estate not reported by the court.

Denies that the approval by the judge of said court of the account and report filed by said administrator in December, 1880, was made improvidently or without due consideration or notice.

Denies that said judge had in his said capacity or in any other capacity whatsoever promised or agreed to notify parties claiming interest in said estate of any action or proceeding therein upon that day or any other day.

Denies that said administrator hath at any time used the property or effects of said estate in any manner whatever save as he lawfully might; denies that he has removed himself from the State of Colorado; admits that at the date of presenting said petition he was temporarily absent from said State at the Territory of Wyoming, and that he is now still so absent.

Admits that he is there attending to a certain herd of cattle; admits that the persons named in the complaint have claimed and

still claim to be entitled to a share in the estate of said John Arthur as next of kin and distributees of the said John Arthur.

Avers that said James B. Arthur, Joseph Jessup, Mary A. Jessup, James Jessup are the sole heirs-at-law and distributees of said decedent; avers that one part of said cattle are the private property of said administrator, and others thereof he admits are the property of said heirs, and were purchased with the proceeds of said estate and monies pertaining thereto properly distributable to said heirs.

17 Avers that such purchase of the said cattle was made by and with the knowledge and express consent of said heirs and for and in lieu of distribution of said monies.

II. And for a second and further defense and answer to the said petition said administrator saith that heretofore and before the year 1876 said petitioner was united in marriage with the said John Arthur; that on the 9th day of February, A. D. 1875, a decree was duly given and made by the probate court in and for the said county of Larimer in favor of the said John Arthur and against the said petitioner, by the name of Abbie A. Arthur, dissolving the bonds of matrimony theretofore existing between them.

III. And for a further answer and defense to said petition said administrator saith that on the 12th day of June, A. D. 1877, in this honorable court a decree was duly given and made in favor of the said John Arthur, as complainant, and against the said petitioner, as defendant, that the bonds of matrimony theretofore existing between them should be and thereby were dissolved, and that all and every duty, rights, and claims accruing to either of them by reason of said marriage should thenceforth cease.

JAMES B. ARTHUR,
Administrator,
By RHODES & LOVE, *Attorneys.*

(Endorsed:) In county court. In the matter of the estate of John Arthur, deceased. Answer of James B. Arthur to petition of Abbie A. Israel, formerly Abbie A. Arthur. Filed July 12th, 1881. T. M. Robinson, county judge.

18 STATE OF COLORADO, }
County of Larimer, } *ss:*

In the County Court of said County for Probate Business.

In the Matter of the Estate of JOHN ARTHUR, Deceased.

The replication of Abbie A. Israel, formerly Abbie A. Arthur, to the answer of James B. Arthur, administrator, to her petition filed herein as to the second and third (II and III) defenses set forth therein.

To the second (II) defense:

Petitioner admits that before the year 1876 she was united in marriage with said John Arthur, deceased, but denies that on the

9th day of February, A. D. 1875, or at any other time a decree was given or made by the probate court in and for the said county of Larimer in favor of the said John Arthur and against this petitioner by any name whatever dissolving the bonds of matrimony theretofore existing between them.

To the further or III answer and defense petitioner denies that on the 12th day of June, A. D. 1877, or at any other time, in this honorable court or any other court, a decree was given or made in favor of said John Arthur, as complainant or otherwise, and against this petitioner, as defendant or otherwise, that the bonds of matrimony theretofore existing between them should be or thereby were dissolved, or that any duty, right, or claim accruing to either of them by reason of said marriage should thenceforth or in any manner cease.

ABBIE A. ISRAEL,
Formerly Abbie A. Arthur, Petitioner,
By HAYNES, DUNNING & HAYNES,
Her Attorneys.

19 (Endorsed:) Larimer county court. *In re* estate of John Arthur, deceased. Reply of Abbie A. Israel to answer of James B. Arthur, administrator, to her petition. Filed July 21st, 1881. T. M. Robinson, county judge. Haynes, Dunning & Haynes, attorneys for petitioner.

STATE OF COLORADO, } ss:
County of Larimer, }

In the County Court in and for the County of Larimer Aforesaid, in Probate Sitting.

In the Matter of the Estate of JOHN ARTHUR, Deceased.

To the Honorable Jeff. McAnnelly, judge of said court:

And comes again your petitioner, Abbie A. Israel, late Abbie A. Arthur, widow of the said John Arthur, deceased, and by leave of the court here for that purpose first had and obtained brings this her amendment and supplement to her original petition in this cause, and thereupon your petitioner says—

That not only hath the said James B. Arthur, administrator as aforesaid of the estate of the said John Arthur, deceased, by and with the money and means which come into his hands and possession as aforesaid as such administrator belonging to said estate, acquired a valuable herd of cattle which he claims as his own or as belonging to him and certain other persons as the heirs-at-law of the said John Arthur, deceased, but hath by the increase of said cattle and by investing and reinvesting said moneys and means aforesaid belonging to said estate of the said John Arthur, deceased, realized and received into his hands a great increase, gain, and profit, so that he now hath
20 in his hands, custody, and control of the said cattle bought by him as aforesaid and the increase thereof divers cattle, to wit, six thousand head or some such other like large number

of cattle, and also hath in his hands, as such administrator, divers large sums of money, amounting in the aggregate to a large sum of money, to wit, to the sum of ($30,000) thirty thousand dollars or some such like large sum, as profits, all which said cattle and money aforesaid are the property of said estate and ought by said administrator to be accounted for to this honorable court and paid over to your petitioner as the sole statutory heir and distributee of the said John Arthur, deceased; nevertheless the said administrator, wholly disregarding his duty and oath of office as such administrator, hath hitherto wholly refused to make a full, true, and perfect report and account to this court of the number of cattle which came to his hands as administrator of the estate of said John Arthur, deceased, to whom or at what price he hath sold the same, what part of the money realized from the sale of said cattle he hath reinvested therein, or what hath been the increase of said cattle or the gains and profits of said estate in his hands, and still doth refuse to make a just, full, and perfect accounting and report to this court of his doings as administrator of said estate and falsely pretends that all the personal estate of the said John Arthur, deceased, at the time of his death which has come to his hands as such administrator when converted into money was of the value of only twenty-three thousand eight hundred and fifty-seven dollars; that he hath not invested or reinvested the same or any part thereof, and hath made no gains or profits of or out of the same, whereas your petitioner charges the contrary thereof to be true, and

21 that said administrator, as your petitioner is informed and believes, received from the sale of the cattle and other property which come to his hands a greater sum of money than the said sum of twenty-three thousand eight hundred and fifty-seven dollars reported by said administrator in his said report of 27th day of October, 1879, and that he hath realized therefrom the gains and profits aforesaid, and that said administrator hath not only appropriated to his own use large sums of money belonging to said estate for which he hath not accounted, made false charges against said estate in his said reports of his doings as administrator thereof, and hath removed and kept and doth keep the money and property belonging to said estate outside of this State, and hath removed the property of said estate outside of and beyond the limits of this State, and hath invested and reinvested the moneys and means of the said estate outside of this State, and hath ever since his appointment as such administrator kept the property of said estate beyond the limits thereof, but hath also converted to his own use all the increase, gains, and profits thereof aforesaid and now seeks to sequestrate to his own use a great part of the moneys which by his said reports he hath admitted to have come to his hands as such administrator by applying the same to the payment of false and fraudulent demands which he brings forward against said estate and falsely pretends he hath paid out of the moneys in his hands belonging to said estate, and to this end said administrator, since the filing of your petitioner's original petition in this cause, hath filed in this court and procured to be allowed as credits in his

favor the following fraudulent claims—that is to say: That on the 2nd day of September, A. D. 1881, said administrator filed in this court his report, wherein he claims credit for the sums therein mentioned, alleged to have been laid out and paid by him
22 upon the accounts and for the purposes in said report stated, and which report is in words and figures as follows, to wit:

"STATE OF COLORADO, } ss:
County of Larimer, }

"To the judge of the county court of Larimer county, in probate business:

"The undersigned, James B. Arthur, administrator of the estate of John Arthur, deceased, would respectfully submit to the court the following report of his acts and doings as such administrator in respect to expenses incurred in the settlement of the said estate, for which he would ask credit of this honorable court:

"First. By reference to former report filed in this court on the 27th day of December, A. D. 1880, it will appear that he had on hands and in his possession as such administrator the sum of $19,079.82.

"He would further report that on the — day of ——, 1880, certain parties, viz., Richard Arthur, William Arthur, Rosetta Arthur, and Grace Arthur Dunn, commenced certain proceedings in this court against him, said administrator, to recover a portion of the said estate, against which he defended in the court successfully by counsel employed by him.

"That he then as such administrator also employed counsel to aid him in the further settlement of said estate and assist him in ascertaining the proper distributees of said estate; that he employed Wells, Smith & Macon, of Denver, Colorado, as attorneys, paying them for services rendered and opinion $250.

"That he also employed L. R. Rhodes, of Fort Collins, paying him as attorney fees, in addition to amount allowed in former report, $285; that he also paid out in expenses incurred by counsel employed $165.

23 "He would further state that on the — day of ——, A. D. 1881, one Abbie A. Arthur, changed after suit commenced to Abbie A. Israel, commenced certain proceedings against him as administrator in this court and before your honor to recover the whole of said estate; that he thereupon employed counsel to defend such action, viz., Rhodes and Love and E. A. Ballard, who appeared, and after a long and tedious trial successfully defended the trust estate in his hands from the claims of said Abbie A. Israel; that he has *employed* the counsel employed to defend this last action the sum of one thousand dollars.

"All of which is respectfully submitted for the approval of this honorable court."

"STATE OF COLORADO, } ss:
County of Larimer, }

"James B. Arthur, administrator of the estate of John Arthur, deceased, being duly sworn, says that the foregoing is a full and correct account of all his dealing and transactions and of all moneys paid out by him as such administrator from the 27th day of December, the date of the last report, to the 2nd day of September, A. D. 1881.

"JAS. B. ARTHUR,
"*Administrator of the Estate of John Arthur, Deceased.*"

"Subscribed and sworn to before me this 2nd day of September, A. D. 1881.

"T. M. ROBINSON,
"*County Judge.*"

(Endorsed:) "Administrator's report. Filed September 2nd, 1881. T. M. Robinson, county judge. Approved this Sept. 2nd, 1881. T. M. Robinson, Co. judge. Recorded in Book 'H,' page- 20, 21, 22."

24 That said administrator, on the same day of the filing of said report, caused and procured the same to be allowed by this court for the aggregate amount of said sums of money, to wit, for the sum of seventeen hundred dollars ($1,700), and for which sum he, the said administrator, took credit against said estate, whereas the said demands for which said administrator thus procured a credit were not nor was any of them such as entitled said administrator to a credit therefor against said estate, and each and every of the said items in said report is fraudulent and not chargeable against said estate—

For that said defense made by said administrator against the said petition of the said Richard Arthur and others was made of his own wrong for the purpose of excluding the said Richard Arthur and others, who were brothers and sisters of the half blood and were equally entitled with the said administrator and others of the whole blood of said John Arthur, deceased, from their inheritance, and who, but for the paramount rights of your petitioner, would have been legally entitled to share in the estate of the said John Arthur, deceased, as the said administrator well knew at the time of the making of said supposed defense, and that said administrator did not employ said attorneys to make said defense for the protection of the said estate, but for the purpose of promoting his own interest by excluding said brothers and sisters of the half blood from participating in said estate, and for that said fees claimed in said report to have been paid to said Wells, Smith and Macon and the said L. R. Rhodes and said sum of money claimed to have been paid out for expenses incurred for counsel are unreasonable and excessive and are not legally chargeable against said estate,

25 and, as your petitioner is informed and believes, were not paid by said administrator, as he hath in said report falsely alleged; and

For that said sum of money claimed in said report to have been paid to said Rhodes & Love and Ballard for defending against your petitioner's said petition herein cannot be legally charged against the said estate or against your petitioner, because to do this would be to take your petitioner's property, money, and means to defray the costs and expenses incurred in an illegal endeavor to keep her out of her rightful and legal inheritance; and

For that said administrator did not at the time of filing said report or at any time thereafter before the allowance thereof file therewith any vouchers of or for either of said items or demands mentioned in said report; that afterwards and after the filing of your petitioner's said original petition herein and on the seventh day of December, 1883, the said administrator filed in this court his certain other report, wherein and whereby he claims credit for the sums therein mentioned alleged to have been laid out and paid by him upon the accounts and for the purpose in said report stated, and which said last report is in words and figures following, to wit:

"STATE OF COLORADO, } ss:
County of Larimer, }

"In the County Court of said County.

"In the Matter of the Estate of JOHN ARTHUR, Deceased.

"To the Honorable A. Q. McGregor, county judge of said county:

"Your petitioner, James B. Arthur, administrator of the estate of John Arthur, deceased, would respectfully represent and show unto your honor—

26 "That during his administration of the said estate and in the year A. D. 1881 certain parties, viz., Richard Arthur, William Arthur, Rosetta Arthur, and Grace Arthur Dunn, instituted proceedings in the county court of said county, claiming to be heirs-at-law of said John Arthur and lawful distributees of said estate.

"That said claim was successfully defended by your petitioner.

"That afterwards one Abbie A. Israel instituted proceedings in the county court of said county, making the claim of heirship and distributee to said estate, which claim was defended by petitioner in said county court successfully and was by said Abbie A. Israel appealed to the supreme court of the State of Colorado; that said Abbie A. Israel also instituted proceedings in said supreme court to set aside and vacate an order and decree of the county court of said county, theretofore made, whereby a marriage theretofore existing between said Abbie A. Israel and said John Arthur, deceased, was annulled and declared void by a decree of divorce awarded to said John Arthur; that your petitioner has at all times since his appointment as administrator given his personal attention to the management and care of said estate; that he has defended against the claims of the several parties herein mentioned in the several courts mentioned; that he has personally superintended the prop-

erty of said estate, consisting of personal and real estate, the real estate consisting of 320 acres of land, which has during his administration been properly cultivated, all of which has been attended with incidental and necessary expenses, paid from time to time by petitioner, for which he received no compensation nor been reimbursed and since hitherto made no demand, and now prays your honor to consider the proper compensation and amount to
27 be allowed petitioner in the premises and to allow such compensation for services and amount for expenses as to your honor may seem meet and proper.

"JAS. B. ARTHUR,
"*Administrator of the Estate of John Arthur, Deceased.*

"(Endorsed:) Estate of John Arthur, deceased. Petition for allowance of expenses, &c., by administrator. Ordered that $2,400.00 be allowed, exclusive of what has been heretofore allowed for care, &c., of cattle, as compensation for services and of managing and administering upon estate of deceased to this date. Filed Dec. 7th, 1883. A. Q. MacGregor, county judge."

That said administrator on the same 7th day of December, 1883, without filing any vouchers for said sums and by falsely representing to this court that the matters and things in said report mentioned were true, procured an allowance upon said report for the sum of twenty-four hundred dollars, and for which sum he, the said administrator, took credit against the said estate, whereas said demands for which said administrator procured said credit and allowance were not nor was any of them such as entitled said administrator to a credit therefor against the said estate or against your petitioner, and each and every of said items in said report and in respect of which said allowance and credit were procured is fraudulent and not legally chargeable against said estate—

For that said defense made by said administrator was made by him of his own wrong for the purpose of excluding said Richard Arthur and others, who were brothers and sisters of the half blood and were equally entitled with the said administrator and others of the whole blood of the said John Arthur, deceased, from their
28 inheritance, and who, but for the paramount right of your petitioner, would have been entitled to share in the estate of said John Arthur, deceased, equally with said administrator and others, claiming to be the heirs of said John Arthur, deceased, as said administrator well knew at the time of making said supposed defense, and that said administrator did not employ said attorneys to make said defense for the purpose of protecting said estate, but for the purpose of protecting his own interest as well as that of said other persons in collusion with him, claiming to be the heirs-at-law of the said John Arthur, deceased, by excluding said brothers and sisters of the half blood from participating in said estate, and for that said judgment and decree rendered by this court upon your petitioner's original complaint herein against your petitioner, as well as said judgment and decree in said divorce pro-

For that said sum of money claimed in said report to have been paid to said Rhodes & Love and Ballard for defending against your petitioner's said petition herein cannot be legally charged against the said estate or against your petitioner, because to do this would be to take your petitioner's property, money, and means to defray the costs and expenses incurred in an illegal endeavor to keep her out of her rightful and legal inheritance; and

For that said administrator did not at the time of filing said report or at any time thereafter before the allowance thereof file therewith any vouchers of or for either of said items or demands mentioned in said report; that afterwards and after the filing of your petitioner's said original petition herein and on the seventh day of December, 1883, the said administrator filed in this court his certain other report, wherein and whereby he claims credit for the sums therein mentioned alleged to have been laid out and paid by him upon the accounts and for the purpose in said report stated, and which said last report is in words and figures following, to wit:

"STATE OF COLORADO, } ss:
County of Larimer, }

"In the County Court of said County.

"In the Matter of the Estate of JOHN ARTHUR, Deceased.

"To the Honorable A. Q. McGregor, county judge of said county:

"Your petitioner, James B. Arthur, administrator of the estate of John Arthur, deceased, would respectfully represent and show unto your honor—

26 "That during his administration of the said estate and in the year A. D. 1881 certain parties, viz., Richard Arthur, William Arthur, Rosetta Arthur, and Grace Arthur Dunn, instituted proceedings in the county court of said county, claiming to be heirs-at-law of said John Arthur and lawful distributees of said estate.

"That said claim was successfully defended by your petitioner.

"That afterwards one Abbie A. Israel instituted proceedings in the county court of said county, making the claim of heirship and distributee to said estate, which claim was defended by petitioner in said county court successfully and was by said Abbie A. Israel appealed to the supreme court of the State of Colorado; that said Abbie A. Israel also instituted proceedings in said supreme court to set aside and vacate an order and decree of the county court of said county, theretofore made, whereby a marriage theretofore existing between said Abbie A. Israel and said John Arthur, deceased, was annulled and declared void by a decree of divorce awarded to said John Arthur; that your petitioner has at all times since his appointment as administrator given his personal attention to the management and care of said estate; that he has defended against the claims of the several parties herein mentioned in the several courts mentioned; that he has personally superintended the prop-

erty of said estate, consisting of personal and real estate, the real estate consisting of 320 acres of land, which has during his administration been properly cultivated, all of which has been attended with incidental and necessary expenses, paid from time to time by petitioner, for which he received no compensation nor been reimbursed and since hitherto made no demand, and now prays your honor to consider the proper compensation and amount to
27 be allowed petitioner in the premises and to allow such compensation for services and amount for expenses as to your honor may seem meet and proper.

"JAS. B. ARTHUR,
"*Administrator of the Estate of John Arthur, Deceased.*

"(Endorsed:) Estate of John Arthur, deceased. Petition for allowance of expenses, &c., by administrator. Ordered that $2,400.00 be allowed, exclusive of what has been heretofore allowed for care, &c., of cattle, as compensation for services and of managing and administering upon estate of deceased to this date. Filed Dec. 7th, 1883. A. Q. MacGregor, county judge."

That said administrator on the same 7th day of December, 1883, without filing any vouchers for said sums and by falsely representing to this court that the matters and things in said report mentioned were true, procured an allowance upon said report for the sum of twenty-four hundred dollars, and for which sum he, the said administrator, took credit against the said estate, whereas said demands for which said administrator procured said credit and allowance were not nor was any of them such as entitled said administrator to a credit therefor against the said estate or against your petitioner, and each and every of said items in said report and in respect of which said allowance and credit were procured is fraudulent and not legally chargeable against said estate—

For that said defense made by said administrator was made by him of his own wrong for the purpose of excluding said Richard Arthur and others, who were brothers and sisters of the half blood and were equally entitled with the said administrator and others of the whole blood of the said John Arthur, deceased, from their
28 inheritance, and who, but for the paramount right of your petitioner, would have been entitled to share in the estate of said John Arthur, deceased, equally with said administrator and others, claiming to be the heirs of said John Arthur, deceased, as said administrator well knew at the time of making said supposed defense, and that said administrator did not employ said attorneys to make said defense for the purpose of protecting said estate, but for the purpose of protecting his own interest as well as that of said other persons in collusion with him, claiming to be the heirs-at-law of the said John Arthur, deceased, by excluding said brothers and sisters of the half blood from participating in said estate, and for that said judgment and decree rendered by this court upon your petitioner's original complaint herein against your petitioner, as well as said judgment and decree in said divorce pro-

ceedings in said administrator's said report mentioned, were, upon writs of error prosecuted thereto by your petitioner to the supreme court of Colorado, reversed, annulled, and set aside, and your petitioner's said petition was remanded to this court to be proceeded in according to said judgment of said supreme court reversing said judgment and decree of this court, and the said judgment and decree of this court in said divorce proceeding in said report mentioned was declared to be null and void, and your petitioner was adjudged her costs against said administrator by her paid, laid out, and expended in and about prosecuting her said writs of error;

For that the said administrator had already taken credit in his said report of September 2nd, 1881, for all the fees and charges claimed by him to have been paid for and on account of said defense alleged to have been made against the said petition of the said Richard Arthur and others; and

29 For that the said claims set up in said administrator's said report filed in this court as last aforesaid for moneys paid, laid out, and expended in defending said petition of the said Richard Arthur and others is the same claim fraudulently as aforesaid presented by him in his said report of September 2nd, 1881, and fraudulently procured to be allowed by the court, and for which he hath already wrongfully and illegally taken credit against the said estate; and

For that said administrator had already been allowed five per cent. upon the whole amount of the personal estate of the said John Arthur, deceased, and hath not made any report of money received by him from the use, rental, or letting of any real estate belonging to the estate of the said John Arthur, deceased; and

For that the said administrator hath not, as your petitioner hath been informed and believes and therefore upon information and belief charges, paid out or expended any of said sums of money in said report mentioned or any part thereof to or for the use of said estate; and

For that said administrator did not, at the time of presenting his said report or at any time since, file therewith any voucher for said sums of money or for any or either of them for which said allowance was made, and hath not, even by said report, stated to whom or what amounts were in fact due on account of said matters in said report mentioned and produced before said court no evidence to establish said demands against said estate; and

For that this court hath no jurisdiction to make any allowance upon said report.

30 That afterwards and after the filing of your petitioner's said original petition herein and after the reversal of the judgment and decree rendered therein by this court as aforesaid, to wit, on the 8th day of December, 1883, said administrator filed in this court his certain other report in words and figures following, to wit:

"STATE OF COLORADO, } ss:
County of Larimer, }

"To the judge of the county court of Larimer *in re* probate:

"The undersigned, James B. Arthur, administrator, &c., would respectfully submit to the court the following report of his acts and doings as such administrator from the 2nd day of September, A. D. 1881, including items not accounted in previous reports, all being in respect to expense incurred in the management and settlement of the said estate and for which he asks credit:

"First. By reference to report filed and approved December 27th, 1880, it will appear that he had in his hands at that time $19,079.82.

"That afterwards and on the 2nd day of September, 1881, he filed another report showing the cost of attorneys' fees in defending against the claims of certain alleged heirs and distributees of said estate, which report was approved and the claims for attorneys' fees allowed and which amounted to $1,700.00, leaving in the hands of administrator on September 2nd, 1881, the sum of $17,379.82, with which amount he is charged.

"Further, he asks to be credited with the following amounts by him paid out in behalf of said estate, as per vouchers herewith submitted:

31

1.	*Dct.* 11th, 1878, for herding cattle belonging to said estate during a portion of the year 1878 and for which he has not received credit	$500 00
2.	Dec. 30th, 1879, taxes paid on real estate, 1879	29 22
3.	Jan'y 13, 1880, paid att'ys' fees *in re* settlement of estate	25 00
4.	Dec. 29, 1880, paid taxes on real estate of said estate	63 89
5.	Sept. 13, 1880, att'ys' fees *in re* settlement of said estate	50 00
6.	M'ch 22, 1881, att'ys' fees *in re* settlement of said estate	100 00
7.	M'ch 23, 1881, att'ys' fees Israel *vs.* Arthur, adm., being the case referred to in report of Sept. 2nd, 1881	50 00
8.	Sept. 2nd, '81, costs paid county court *in re* said estate	61 80
9.	Ap'l 19, '81, att'ys' expense *in re* Israel *vs.* Arthur, adm'r	300 00
10.	Dec. 29, '81, att'ys' fees in matter of administration of said estate	50 00
11.	Jan'y 31, '82, att'ys' in Israel *vs.* Arthur, ad., in the supreme court, case referred to in report of Sept. 2, 1881, the same having been appealed to said court	240 00
12.	Feb'y 1st, '82, taxes on land of estate	37 60

13. Oct. 16, '82, att'ys' fees and expenses in Israel *vs.* Arthur, ad., in supreme court, case referred to above, and another case taken to supreme court in error from Co. court of Larimer county in the matter of divorce between John Arthur, dec'd, and Abbie A. Arthur, now Israel..... $500 00
14. Nov. 4, —, att'ys in above matter in sup. court..... 475 65
15. Oct. 31, '82, taxes on land of estate..... 70 75
16. April 1, 1881, costs in full in county court *in re* settlement of estate to date probate, April, 1881.. 49 40

32

17. Dec. 1st, '83, paid for necessary repairs on fences, buildings, and dwelling on farm of estate, including labor and materials..... 203 33
18. Dec. 3rd, 1883, taxes on said lands of estate..... 43 20
19. Dec. 8th, '83, am't allowed by county court for actual services and expenses in and about the management and care of said estate to date, exclusive of any am't heretofore allowed for care of cattle or other property..... 2,400 00

Making a total amount for which he now asks credit..... $5,249 84
Which amount being deducted from the amount reported to be in his hands after the approval of the report of September 2nd, 1881, of..... 17,379 82

Leaves now in his hands and due the estate... $12,129 98

"All of which is respectfully submitted.

"STATE OF COLORADO, }
County of Larimer. }

"James B. Arthur, administrator of the estate of John Arthur, dec'd, being duly sworn, on oath says the foregoing account of his acts and doings and of moneys paid out by him for said estate as administrator thereof are true and correct, and all credits therein claimed are just and should be allowed.

"JAMES B. ARTHUR,
"*Administrator of the Estate of John Arthur, Dec'd.*"

"Subscribed and sworn to before me this 8th day of December, A. D. 1883.

A. Q. McGREGOR,
County Judge."

(Endorsed:) "Estate of John Arthur, dec'd. Report of adm'r. Filed Dec. 8th, 1883. Approved Dec. 8th, 1883. A. Q. McGregor, county judge. Recorded in Book 'H,' on page- 57, 58, 59. Filed Dec. 8th, 1883. A. Q. McGregor, county judge."

33 That said administrator, on the same 8th day of December, 1883, without filing any vouchers for the sums and items in said report mentioned claimed to be due said administrator from said estate and by false representations that the matters and things in said report mentioned were true, procured said report to be approved and said sums of money therein mentioned to be allowed to him, the said administrator, as a credit against said estate; whereas the said charges made in said report against said estate for said sum of seventeen hundred dollars and twenty-four hundred dollars theretofore allowed said administrator upon his said reports of September 2nd, 1881, and December 7th, 1883, and for the sum of five hundred dollars for herding cattle belonging to said estate; for the sum of three hundred dollars, "att'ys' expenses *in re* Israel *v.* Arthur, administrator;" for the sum of two hundred and forty dollars, "att'ys' fees in Israel *v.* Arthur, adm'r, in the supreme court, case referred to in report of Sept. 2, 1881, the same having been appealed to said court;" for the sum of five hundred dollars, "att'ys' fees and expenses in Israel *v.* Arthur, adm'r, in supreme court case, referred to above, and another case taken to supreme court in error from the county court of Larimer county in the matter of divorce between John Arthur, dec'd, and Abbie A. Arthur, now Israel;" for the sum of $475.65, "att'ys' fees in the above matter in the supreme court," and for the sum of $203.33 "paid for necessary repairs on fences, buildings, and dwelling on farm of estate, including labor and materials," are each and every of them fraudulent and not properly chargeable against said estate for the reasons hereinbefore stated; and

34 For that said administrator did not ever at any time file in said court vouchers for any or either of the said items aforesaid for which he claimed and obtained an allowance; and

For that said claims are excessive and have in fact never been paid by said administrator, in whole or in part, as your petitioner is informed and believes; and

For that said sum of $500 for herding cattle hath already been allowed to said administrator; and

For that said administrator hath not, as your petitioner is informed and believes and therefore upon information and belief alleges, paid said sum of $500 or any part thereof for herding said cattle or for any other purpose; and

For that said sum of $500 is not nor is any part thereof due or owing from said estate to said administrator for herding said cattle or for any other cause whatever, as your petitioner is informed and believes; and

For that, as your petitioner is informed and believes and therefore on information and belief alleges, *that* said administrator hath not paid said sums aforesaid or any part thereof.

And your petitioner further says that said several reports and allowances are fraudulent upon the face thereof, in this, that it doth appear from said reports that the said administrator hath been allowed in all a credit for about the sum of twelve thousand dollars for the costs of administering said estate, of which sum about seven

thousand dollars is alleged to have been paid for attorneys' fees without in many cases showing to whom said fees were due; and

35 For that in his said report filed December 7th, 1883, said administrator states "that he has personally superintended the property of said estate, consisting of personal and real estate, the real estate consisting of 320 acres of land, which has, during his administration, been properly cultivated;" yet he has rendered no account or statement of the rents, issues, or profits of said real estate, nor what the annual rental thereof was worth, nor has he charged himself anything therefor; and

For that in his said report filed December 8th, 1883, he makes the following charge against said estate, viz: "March 23, '81, att'ys' fees Israel *v.* Arthur, adm'r, being the case referred to in report of Sept. 2, 1881, $50.00; April 19th, '81, att'y's expense *in re* Israel *v.* Arthur, adm'r, $300.00," when, in fact, as appears by said reports and by the records of this court, there was at the dates of said charges no such case as Israel *v.* Arthur, adm'r, pending, and that this proceeding, being the case in said charges referred to, was not commenced until long after those dates; and

For that said administrator by his said report admits that the sum of $23,857.00 of the moneys of said estate came into his hands in the month of July, A. D. 1879, yet hath rendered no account or statement whatever, nor hath he charged himself with any sum for the use and interest upon said moneys during all this time, nor does he show where said moneys have been kept, or what use has been made thereof, except in the payment of the aforesaid false and fraudulent charges; and for that in his said reports filed in A. D. 1879 and A. D. 1880 he makes certain charges for herding

36 cattle in 1878 and for attorneys' fees paid by him in 1878 and 1879, and by his verification of said reports makes oath that the same contain complete statements of all moneys received and paid out by him belonging to said estate, yet in his said report filed December 8, 1883, he makes the following charge, viz: "Oct. 11th, 1878, for herding cattle belonging to said estate; during a portion of the year 1878, $500.00."

And your petitioner charges that if the said administrator is allowed to continue his vexatious litigation against your petitioner, and shall be allowed to charge the costs, fees, and expenses of such litigation against said estate, and take the same out of your petitioner's inheritance as sole statutory heir and distributee of said John Arthur, deceased, there will soon, at the rate said administrator is going, be nothing left for your petitioner, and the whole of said estate will be consumed in an unlawful endeavor to keep your petitioner out of her just rights and lawful inheritance; and your petitioner further charges that said administrator ought not only to be adjudged to make a full and complete accounting of his doings as administrator of said estate, but that by reason of his false and fraudulent conduct and reports aforesaid and his unlawful and vexatious doings aforesaid he ought at once to be removed from his said office of administrator of said estate, and some honest and

disinterested person appointed in his place and stead to administer *of* said estate pending the litigation herein, and that said administrator be ordered to pay over immediately to such successor in the administration the sum of $12,129.98, by his said report of December 8th, 1883, admitted to be in his hands.

37 Wherefore your petitioner prays as she hath already prayed in and by her said original petition and that said reports of September 2nd, 1881, December 8th, 1883, and said report of December 8th, 1883, and the allowance thereof in favor of said administrator and each of them be set aside and held for naught, and that he account for said sums of money for which he hath obtained said fraudulent credits aforesaid.

That said James B. Arthur, as administrator of the estate of said John Arthur, deceased, be removed from his said office of administrator, and that some honest and disinterested person be appointed administrator of said estate of the said John Arthur, deceased, in the place and stead of the said James B. Arthur, and that he be ordered to pay over to such person when so appointed the said sum of $12,129.98 by said James B. Arthur admitted to be in his hands as administrator of said John Arthur, deceased.

That the said James B. Arthur and the said other claimants in your petitioner's original petition named may answer the premises in your petitioner's original petition herein which they have heretofore failed to answer, as well as this your petitioner's amendment and supplement thereto, and that the said James B. Arthur particularly answer and set forth what number of cattle and the amount of other property come to his hands as administrator of the said John Arthur; when the same came to his hands; what disposition he made of the same; when he disposed thereof; to whom and for what price he sold the same; whether he sold the same for cash or on credit, and, if on credit, then what credit and at what rate of interest said credit was given; whether at the time he filed his said report of the 27th of October, 1879, said sum of money for

38 which he had sold said cattle had been paid to him, and, if not, when was the same paid to him; whether he hath since said money come to his hands invested and reinvested the same in cattle; how often he hath invested and reinvested the same in cattle; what has been the increase of cattle bought with said money; what number of cattle he had on hand at the time of the filing of petitioner's original petition herein, bought with the money and means of said estate, and the then value thereof; what number thereof he now hath on hand and the value thereof.

What profit hath been made upon said moneys and property of said estate since it has been in his hands, either by investing and reinvesting the same in cattle or otherwise, and whether there hath not been made a gain and profit upon said moneys and means since the same has been in his hands as such administrator, and if he shall say that said money and means has not been invested as aforesaid that he then state how and in what manner the same hath been invested and what income hath been realized therefrom since said money and means came to his hands as such adminis-

trator; whether he hath not, ever since said money came to his hands, kept the same invested in his name and for his own use and benefit and invested and kept the same outside the limits of said State of Colorado, and whether he hath not, by the use of said money, realized great gains and profits, and what gains and profits he hath realized therefrom, and whether he hath not appropriated the same to his own use and not accounted therefor to said estate.

For such other relief as to your honor may seem meet in the premises, and, as in duty bound, your petitioner will ever pray.

ABBIE A. ISRAEL,
By DECKER & YONLEY AND
S. B. A. HAYNES, *Her Att'ys.*

39 (Endorsed:) No. 826. County court, Larimer county. Abbie A. Israel *v.* James B. Arthur, adm'r, & others. Amendment and supplement to original petition. Filed in this office this 30th day of March, A. D. 1884. Knud Patton, clerk. Decker & Yonley.

STATE OF COLORADO, } ss:
Larimer County, }

I hereby certify that on this 20th day of February, A. D. 1884, I served the within upon James B. Arthur, mentioned in the same, by delivering a true copy to him in person in said county.

JAMES SWEENEY, *Sheriff,*
By PETER SWEENEY, *Dep-ty.*

STATE OF COLORADO, } ss:
Larimer County, }

In the County Court of said County, in Probate Sitting.

In the Matter of the Estate of JOHN ARTHUR, Deceased.

Amended and Supplemental Answer of James B. Arthur.

And now comes the said James B. Arthur and, by leave of the court first had and obtained, files this his amended and supplemental answer to the petition of the said Abbie A. Israel, and avers that he is a surving brother of the said John Arthur, deceased, and one of his heirs-at-law, to whom the estate of which he died seized descended. He denies that the said John Arthur died leaving the said petitioner his wife up to the time of his death or that she is or ever has been his widow. He avers that in the lifetime of the said John Arthur, deceased, to wit, on the 9th day of February, A. D. 1875,

40 in a certain action then pending in the probate court of said county of Larimer, wherein the said John Arthur was plaintiff and the said petitioner was defendant, a judgment and decree was rendered and entered of record by the said court whereby the marriage relation before that time existing between the said parties was adjudged to be dissolved, annulled, and held for naught and the said John Arthur and the said petitioner forever

absolved and released from all obligations on account of the same, but which said decree of divorce was voidable, in so far as the said petitioner was concerned at her election to avoid the same, for want of due and legal service upon her of notice of the pendency and prayer of the bill exhibited against her in the said action.

He further avers that afterward, in the lifetime of the said John Arthur, to wit, on the 12th day of June, A. D. 1877, in a certain action then pending in the county court of said county of Larimer, wherein the said John Arthur was plaintiff and the said petitioner was defendant, a judgment and decree was rendered *and* by said court and entered of record therein whereby the marriage relation previously existing between the said parties was adjudged to be dissolved, annulled, and held for naught and the said John Arthur and the said petitioner wholly absolved and released from all obligations on account of the same, but which said decree of divorce was voidable, in so far as the said petitioner was concerned at her election to avoid the same, for want of due and legal service upon her of notice of the pendency and prayer of the complaint filed against her in said action. He avers that after the said decrees of divorce were so as aforesaid rendered the said petitioner, with full nkowledge that they had been so rendered, ratified, affirmed,
41 assented to, and acquiesed in the same and each of them, in this, to wit, in that after the same had been rendered and in the lifetime of the said John Arthur *and* the said defendant, by force and virtue of the said decrees and under and in pursuance thereof, entered voluntarily into a contract of marriage with one James H. Israel and caused and procured the said contract of marriage to be duly and legally solemnized, and thereunder took upon herself and assumed the relations of wife to the said James H. Israel, and thenceforward and at all times thereafter continuously, by virtue of the said solemnization of said marriage contract, lived and cohabited with the said James H. Israel as his wife until and ever since the death of the said John Arthur.

He avers that for reasons that will hereinafter more fully appear he is unable to state the time when or the place where the said marriage contract was so as aforesaid solemnized, and avers that he has been unable at any previous stage of this proceeding to plead the said marriage in bar of the alleged rights of said petitioner and of her alleged heirship to the estate of said decedent, because he says that he did not discover the fact that the said petitioner had so entered into marital relations with the said James H. Israel, as hereinbefore set forth, until late in the month of February, A. D. 1884; that at all times prior to making said discovery and after the said petitioner laid claim to the said estate and commenced these proceedings to obtain the same he has made diligent, persistant, and continuous effort to ascertain the exact relation and status existing between the said petitioner and the said James H. Israel by making due, diligent, and careful inquiry of all persons that he believed or had reason to believe could give or afford him any informa-
42 tion regarding the same and by carrying on correspondence with different persons who were acquainted with the said

petitioner and the said James H. Israel when they were so as aforesaid living and cohabiting together as husband and wife and who resided at the places where the said petitioner and the said James H. Israel had so lived and cohabited together and by visiting in person the localities where they had so lived and making inquiries in person of their acquaintances and examining the public records in various counties where they had so resided, all with a view to ascertain whether said marriage contract had been in fact solemnized or not. Nevertheless he was unable to learn with certainty that said marriage had been so solemnized until the time aforesaid. He states as the reason why he was unable to obtain and acquire such information at an earlier period that on or about the first day of October, A. D. 1873, the said petitioner abandoned the said John Arthur and left his bed and board and eloped and fled to remote and unknown parts with the said James H. Israel, and thereafter and until the solemnization of said marriage contract continuously lived and cohabited with the said James H. Israel in a state of adultery, during all which time she, as well as the said James H. Israel, represented themselves to be husband and wife and so held themselves out to be in all the different communities in which they then resided, and after the said decrees of divorce had been rendered as aforesaid and in the lifetime of said John Arthur, the knowledge that they had been so rendered coming to the said petitioner and to the said James H. Israel, *and* the said petitioner, desiring to use the privilege conferred by said decrees and to accept the benefits thereof, did
43 procure the said marriage to be solemnized as aforesaid, but in order to conceal from their neighbors and acquaintances the illicit and adulterous relations which they had previously sustained toward each other and to prevent the scandal and disgrace which would have resulted from the exposure which must necessarily have arisen from a public marriage or from any marriage taking place at their usual place of abode and among their said neighbors and acquaintances the said petitioner and the said James H. Israel went away from the place where they were then living together in southern Colorado to some place unknown and remote therefrom and were secretly and privily married in due form of law.

He further avers that he has no certain means of knowing whether said marriage was solemnized in the State of Colorado or not, and avers that at the time the same was so solemnized that no license was required to be issued therefor in Colorado, and that parties authorized to solemnize marriages therein paid but little attention to the provisions of the statute requiring them to furnish certificates of marriage by them solemnized for record, and in general neglected to furnish such certificates when thereto required by law.

In July, 1881, the petitioner admitted and confessed to certain confidential friends of hers at Fort Collins, under injunctions of secrecy, that she had been duly married to the said James H. Israel after the rendition of said decrees of divorce and in the lifetime of the said John Arthur, but did not state where or when said mar-

riage took place. No disclosure of said admissions and confessions was made by the persons to whom the same had been confided until after two certain actions pending in the supreme court of Colorado, wherein the said petitioner was plaintiff and James B. Arthur *et als.* were defendants, had been decided by said court in favor of the said petitioner, and the said friends of the petitioner believed that such disclosures would not and could not result to her prejudice.

44

In February, 1884, the respondent, James B. Arthur, learned by accident of the said admissions and confessions and immediately put certain persons acting in his behalf into communication with the persons to whom the same were made, and by acting on the information thus gained is now fully prepared to show by satisfactory proof that the said petitioner and the said James H. Israel were married as hereinbefore set forth.

Wherefore he prays that said petitioner be adjudged not to be the widow of the said John Arthur, deceased, or heir to his estate; that her said petition be dismissed and that he recover his costs.

RHODES & LOVE,
BALLARD & ROBINSON,
Att'ys for James B. Arthur.

(Endorsed:) In the matte rof the estate of John Arthur, deceased. Amended and supplemental answer of James B. Arthur. Filed April 9th, A. D. 1884. Knud Patton, clerk. Rhodes & Love, Ballard & Robinson.

STATE OF COLORADO, } *ss:*
County of Larimer, }

In the County Court of said County, Sitting for the Transaction of Probate Business.

In the Matter of the Estate of JOHN ARTHUR, Deceased.

Now comes James B. Arthur, administrator of the estate of John Arthur, deceased, and as such administrator, by leave of court first had and obtained, answering the amendment and supplement to the original petition of Abbie A. Israel, now on file in this matter, says that he has not misused, misappropriated, or misapplied any of the funds or assets of said estate as charged by said petitioner or in any other manner; neither has he converted the same or any part thereof to his own use or benefit.

45

He alleges that he has in all things faithfully, carefully, and prudently discharged his duty as such administrator and has at all times been and still — ready to account fully and particularly to the court touching any and all of his acts and doings as such administrator or concerning the said estate so in his hands, and to abide by and perform any order the court might lawfully make in the premises.

He denies that any of the matters mentioned in any of his reports as such administrator, wherein he claimed credit and charged

said estate (and which were allowed by the court), were not properly chargeable against said estate.

He denies that any of the said claims were fraudulent or made fraudulently, and alleges that they and each of them were and are just and proper charges against said estate for money paid out and for services actually rendered, as in and by such reports represented, and that at the time of making such reports and of their approval by the court he presented proper vouchers and satisfactory proofs to the court or judge approving the same that such reports were correct and true.

That as to the claims made by him in said reports against said estate and allowed by the court for money paid out in and about the expenses of the litigation mentioned in said reports, including the counsel fees mentioned, he alleges that the same were
46 actually and truly paid, as he has heretofore shown, and that such expenses were incurred in good faith and for the sole purpose of protecting the fund and estate in his hands as administrator from the claims and demands of the persons mentioned in said reports, who were and had been falsely claiming and pretending to be the lawful heirs of said John Arthur, deceased, and to be entitled to his estate as distributees thereof, to the end that said estate might be preserved to the real and true heirs of the said John Arthur, deceased, to be turned over and distributed to them when directed by the court upon its finding and determining who of the different claimants were and are the lawful heirs of said John Arthur, deceased, to whom his estate should be distributed.

That the said claims so allowed were and are just, reasonable, and correct, and having been incurred in good faith for the benefit of said estate are properly chargeable against it.

And he stands ready to make final settlement of said estate and report of his acts and doings as such administrator to the court at such time as the court may direct.

JAMES B. ARTHUR,
By L. R. RHODES.
BALLARD, ROBINSON & LOVE, *His Att'ys.*

(Endorsed :) In the matter of the estate of John Arthur, deceased. Answer of administrator to amendment and supplement to original petition of Abbie A. Israel. Filed April 9th, A. D. 1884. Knud Patton, clerk.

47 STATE OF COLORADO, } *ss:*
County of Larimer, }

In the Circuit Court in and for said County, in Probate Sitting.

In the Matter of the Estate of JOHN ARTHUR, Deceased.

Demurrer of Abbie A. Israel, petitioner herein, to the answer of James B. Arthur, administrator, to the amendment and supplement to the original petition of said petitioner.

And comes the said Abbie A. Israel, petitioner, and demurs to the answer of the said James B. Arthur, administrator of the estate of

John Arthur, deceased, to the amendment and supplement to her original petition, and for cause of demurrer says:

First. That said answer does not state facts sufficient in law to constitute a defense to petitioner's said petition or to the amendment and supplement thereto.

Second. That said answer does not contain any denial or denials of the allegations or charges in said petition or in the amendment and supplement thereto made, nor does it state any facts in avoidance of said allegations and charges or either of them.

Third. That said answer does not state facts in answer to said petition or to the amendment and supplement thereto, but, on the contrary, all the statements in said answer made are mere conclusions of law.

Whereupon petitioner prays judgment, etc.

DECKER & YONLEY &
S. B. A. HAYNES,
Att'ys for Abbie A. Israel, Petitioner.

48 (Endorsed:) In county court, Larimer county. In the matter of the estate of John Arthur, deceased. Demurrer of Abbie A. Israel, petitioner, to the answer of James B. Arthur, administrator, to the amendment and supplement to her original petition. Filed April 28th, 1884. Knud Patton, clerk.

STATE OF COLORADO, } ss:
Larimer County, }

In the County Court of said County for Probate Business.

In the Matter of the Estate of JOHN ARTHUR, Deceased.

James B. Arthur, administrator of said estate, now comes and, for answer to the amendment and supplement to the original petition of Abbie A. Israel, on file herein, says:

He denies that as administrator of said estate or otherwise, with the money or means which came into his hands or possession as such administrator and belonging to said estate, he acquired a valuable or other herd of cattle.

He denies that by the increase of any cattle or by investing or reinvesting any of the money or means belonging to the said estate he has realized any increase, gain, or profit, or that he now has or ever had in his hands, custody, or control any cattle bought by him with the money or means belonging to said estate, or that he has in his hands as such administrator or otherwise any sum of money whatever as profit arising from any cattle purchased with money or means belonging to said estate or from investments or reinvestments of any of such money or means.

49 He denies that he has not rendered full, true, and perfect accounts of all his acts or doings as such administrator up to the time of the filing of his last report.

He denies that the personal estate of the said John Arthur, deceased, which came to his hands as such administrator, when con-

verted into money or at any other time, exceeded in value the sum of $23,857.00. He denies that he received from the sale of the cattle and other property belonging to the said John Arthur, deceased, and coming into this administrator's hands a greater sum than reported by him in his said report.

He denies that he has realized therefrom any gains or profits, as alleged by the petitioner, or that he hath appropriated to his own use any sum of money whatever belonging to said estate, or hath made any false charge against said estate in any of his reports of his doings as administrator thereof, or that he hath removed or kept or keeps any of the money or property belonging to said estate outside of this State or beyond its limits, or has invested or reinvested the money or means of said estate or any part thereof outside of this State, or that he has kept the property of the estate beyond the limits of this State, or that he has converted to his own use any increase, gains, or profits thereof, or that he now seeks or has ever sought to sequestrate to his own use any of the moneys of said estate by applying the same to the payment of any false or fraudulent demand against said estate, or that he has brought forward against said estate any false or fraudulent claim or demand.

50 He denies that any of the items mentioned in his report of Sept. 2nd, 1881, are fraudulent, false, or not properly chargeable against said estate, but he avers that each of the items therein mentioned as having been paid out by him were in fact and in good faith incurred and paid out by him as such administrator, and were such as entitled him to credit therefor against said estate.

He denies that the defense made by him as such administrator against the petition of said Richard Arthur and others was made of his own wrong or for the purpose of excluding any one from his or her legal rights to participate in said estate, or that he employed said attorneys for the purpose of promoting his own interests, but he avers that he employed said attorneys for the protection of said estate against the pretended claims of the said Richard Arthur and others, petitioners therein, to be entitled to a participation therein.

He denies that the said fees paid to said attorneys or the sum of money paid out for expenses of counsel, as mentioned in said report, were unreasonable or excessive or that they were not chargeable against said estate.

He avers that all the facts stated in his report, Dec. 7th, 1883, were and are true, and that all the claims made therein for allowance were properly chargeable against said estate, and the allowances made to him by the court were proper and right, and denies that any of the items mentioned in said report in respect to which said allowance was made *was* fraudulent and not chargeable against said estate.

51 He denies that said Richard Arthur and others were brothers and sisters of the half blood, or that they were equally entitled with the administrator and others of the whole blood to share in the said estate, or that he did not make said defense for the purpose of protecting said estate, but avers the fact to

be that said defense was made for the sole and only purpose of protecting and preserving said estate for the proper distributees thereof. He denies that he had taken credit in his said report of Sept. 2nd, 1881, for all the fees and charges claimed by him to have been paid for and on account of said defense alleged to have been made against the said Richard Arthur and others, or that said claim in said report is the same claim presented in his said report of Sept. 2nd, 1881, or that said claims or either of them were fraudulently procured to be allowed by the court, or that he ever fraudulently or illegally took credit therefor, or that said administrator has already been allowed five per cent. upon said estate, or that there is anything due from him from the use, rental, or letting of said real estate for which he hath not fully accounted, or that he hath not paid out the said sums of money in said report mentioned for the use of said estate, or that he hath not produced vouchers and evidence before said court to establish said amounts against said estate, or that this court had no jurisdiction to make said allowances, or that he procured said report, filed on the 8th day of December, 1883, to be approved by any false or fraudulent representation or representations, or that the claims specified by the plaintiff contained in said report or any one of them are or is false and fraudulent or not properly chargeable against said estate for the reasons mentioned in said petition or any other reason, or that he
52 did not file vouchers for said claims in said court, or that said claims are excessive, or that the same have not been paid, or that said sum of $500 had already been allowed him, or that he hath not paid said sum of $500.00, or that said sum of $500 is not due said administrator, or that he hath not paid sums and every part thereof, or that said several reports are fraudulent upon the face thereof, or that he has ever been improperly allowed any sum or sums as credits against said estate, or that he hath not fully accounted for the rents, issues, and profits of the real estate belonging to the said estate of said decedent, or that said report shows any money paid on account of att'y fees *In re* Israel *v.* Arthur *paid* April 19th, 1881, or that said cause was not then pending, or that said administrator is chargeable under the law with any sum as interest upon the amount that came into his hands by virtue of said trust; and this respondent further says that in all things he has faithfully, diligently, and lawfully discharged the duties of his said trust and in all things faithfully administered said estate; that all expenses incurred and money paid out in and about the various suits mentioned in said petition were incurred and paid out in good faith under the *bona fide* belief that the said petitioner was not the widow and heir of John Arthur, deceased, for the sole and only purpose of protecting and preserving said estate for the rightful heirs thereof; and your respondent is ready to make his final report as such administrator when thereto required by the order of this honorable court.

He therefore asks to be hence dismissed with his costs.

RHODES & LOVE,
BALLARD AND ROBINSON,
Att'ys for Respondent.

verted into money or at any other time, exceeded in value the sum of $23,857.00. He denies that he received from the sale of the cattle and other property belonging to the said John Arthur, deceased, and coming into this administrator's hands a greater sum than reported by him in his said report.

He denies that he has realized therefrom any gains or profits, as alleged by the petitioner, or that he hath appropriated to his own use any sum of money whatever belonging to said estate, or hath made any false charge against said estate in any of his reports of his doings as administrator thereof, or that he hath removed or kept or keeps any of the money or property belonging to said estate outside of this State or beyond its limits, or has invested or reinvested the money or means of said estate or any part thereof outside of this State, or that he has kept the property of the estate beyond the limits of this State, or that he has converted to his own use any increase, gains, or profits thereof, or that he now seeks or has ever sought to sequestrate to his own use any of the moneys of said estate by applying the same to the payment of any false or fraudulent demand against said estate, or that he has brought forward against said estate any false or fraudulent claim or demand.

50 He denies that any of the items mentioned in his report of Sept. 2nd, 1881, are fraudulent, false, or not properly chargeable against said estate, but he avers that each of the items therein mentioned as having been paid out by him were in fact and in good faith incurred and paid out by him as such administrator, and were such as entitled him to credit therefor against said estate.

He denies that the defense made by him as such administrator against the petition of said Richard Arthur and others was made of his own wrong or for the purpose of excluding any one from his or her legal rights to participate in said estate, or that he employed said attorneys for the purpose of promoting his own interests, but he avers that he employed said attorneys for the protection of said estate against the pretended claims of the said Richard Arthur and others, petitioners therein, to be entitled to a participation therein.

He denies that the said fees paid to said attorneys or the sum of money paid out for expenses of counsel, as mentioned in said report, were unreasonable or excessive or that they were not chargeable against said estate.

He avers that all the facts stated in his report, Dec. 7th, 1883, were and are true, and that all the claims made therein for allowance were properly chargeable against said estate, and the allowances made to him by the court were proper and right, and denies that any of the items mentioned in said report in respect to which said allowance was made *was* fraudulent and not chargeable against said estate.

51 He denies that said Richard Arthur and others were brothers and sisters of the half blood, or that they were equally entitled with the administrator and others of the whole blood to share in the said estate, or that he did not make said defense for the purpose of protecting said estate, but avers the fact to

be that said defense was made for the sole and only purpose of protecting and preserving said estate for the proper distributees thereof. He denies that he had taken credit in his said report of Sept. 2nd, 1881, for all the fees and charges claimed by him to have been paid for and on account of said defense alleged to have been made against the said Richard Arthur and others, or that said claim in said report is the same claim presented in his said report of Sept. 2nd, 1881, or that said claims or either of them were fraudulently procured to be allowed by the court, or that he ever fraudulently or illegally took credit therefor, or that said administrator has already been allowed five per cent. upon said estate, or that there is anything due from him from the use, rental, or letting of said real estate for which he hath not fully accounted, or that he hath not paid out the said sums of money in said report mentioned for the use of said estate, or that he hath not produced vouchers and evidence before said court to establish said amounts against said estate, or that this court had no jurisdiction to make said allowances, or that he procured said report, filed on the 8th day of December, 1883, to be approved by any false or fraudulent representation or representations, or that the claims specified by the plaintiff contained in said report or any one of them are or is false and fraudulent or not properly chargeable against said estate for the reasons mentioned in said petition or any other reason, or that he
52 did not file vouchers for said claims in said court, or that said claims are excessive, or that the same have not been paid, or that said sum of $500 had already been allowed him, or that he hath not paid said sum of $500.00, or that said sum of $500 is not due said administrator, or that he hath not paid sums and every part thereof, or that said several reports are fraudulent upon the face thereof, or that he has ever been improperly allowed any sum or sums as credits against said estate, or that he hath not fully accounted for the rents, issues, and profits of the real estate belonging to the said estate of said decedent, or that said report shows any money paid on account of att'y fees *In re* Israel *v.* Arthur *paid* April 19th, 1881, or that said cause was not then pending, or that said administrator is chargeable under the law with any sum as interest upon the amount that came into his hands by virtue of said trust; and this respondent further says that in all things he has faithfully, diligently, and lawfully discharged the duties of his said trust and in all things faithfully administered said estate; that all expenses incurred and money paid out in and about the various suits mentioned in said petition were incurred and paid out in good faith under the *bona fide* belief that the said petitioner was not the widow and heir of John Arthur, deceased, for the sole and only purpose of protecting and preserving said estate for the rightful heirs thereof; and your respondent is ready to make his final report as such administrator when thereto required by the order of this honorable court.

He therefore asks to be hence dismissed with his costs.

RHODES & LOVE,
BALLARD AND ROBINSON,
Att'ys for Respondent.

53 (Endorsed:) In the matter of the estate of John Arthur, deceased. Answer of James B. Arthur, administrator, to amendment and supplement to original petition of Abbie A. Israel. Filed August 25, 1884. Jeff. McAnelly, acting clerk.

STATE OF COLORADO, } ss:
Larimer County, }

In the County Court of said County, in Probate Sitting.

In the Matter of the Estate of JOHN ARTHUR, Deceased.

And comes Abbie A. Israel, late Abbie A. Arthur, and for replication to the answer of James B. Arthur, administrator of said estate, to her amendment and supplement to her original petition, or unto so much and such parts of said answer as she is advised is or are material for her to reply to, replying, says that it is not true that said James B. Arthur, administrator, employed said attorneys for the protection of the said estate of the said John Arthur, deceased, and denies that the said proceedings of the said Richard Arthur and others in any manner concerned or could in any — affect the interests of said estate; denies that all or any of the things in said administrator's report of December 7th, 1883, stated were or are true, or that the same or any of the items for which said administrator took credit therein were properly chargeable against said estate, or that the said allowances made to him against said estate were proper or right; denies that all or any of the expenses incurred or monies paid by said administrator, James B. Arthur, in or about the said suits mentioned in petitioner's said petition were in-
54 curred or paid by the said James B. Arthur, as administrator of the said estate, in good faith or under the *bona fide* belief that petitioner was not the widow and heir of said John Arthur, deceased, or for the sole or only purpose of protecting or preserving said estate for the rightful heirs thereof, and your petitioner avers and says that said defenses were made by the said James B. Arthur against your petitioner and against the petition of the said Richard and others in his own right as pretended heir of the said John Arthur, deceased, and were not made for the purpose of protecting and preserving said estate, but for the purpose of protecting the rights of the said James B. Arthur as a pretended heir of said John Arthur, but that said defenses did not, nor did either of them, in any manner tend to preserve or protect the said estate or the property thereof, and that the said James B. Arthur, for all the purposes of settling and determining petitioner's rights in the premises, is a stranger to petitioner and her said rights and cannot be allowed to take her inheritance to pay the cost, fees, and expenses incurred by him in his endeavors to keep her out of her just and legal rights; and your petitioner, having fully replied, or intended so to do, doth here again pray as in and by her petition and amendment and supplement thereto she hath already prayed, etc.

DECKER & YONLEY,
Att'ys for Petitioner.

(Endorsed:) In county court, Larimer county. In the matter of the estate of John Arthur, deceased. Replication of Abbie A. Israel to the answer of James B. Arthur, as administrator, to amendment and supplement to original petition. Filed September 23rd, 1884. Jeff. McAnelly, judge.

55 STATE OF COLORADO, } ss:
Larimer County, }

In the County Court, in Probate.

ABBIE A. ISRAEL, Petitioner,
vs.
JAMES B. ARTHUR, Administrator, etc., Respondent.

In the matter of the estate of John Arthur, deceased. Petition for distribution, etc.

And now comes the said petitioner, Abbie A. Israel, by S. B. A. Haynes, her attorney, and, by leave of the court first had and obtained, replies to the amended and supplemental answer of the said respondent, and denies that in the lifetime of the said John Arthur, deceased, on the 9th day of February, 1875, or upon any other day, in an action pending in the probate court of said Larimer county, wherein the said John Arthur was plaintiff and this petitioner was defendant, or in any action whatever, a judgment or a decree of divorce was rendered or entered of record by said court whereby the marriage relation before that time existing between the said parties was adjudged to be dissolved, annulled, or held for naught or the said John Arthur or this petitioner forever or at all absolved or released from any or all obligations on account of the same; denies that in the lifetime of the said John Arthur, on the 12th day of June, 1877, or on any other day, in an action then pending in the county court of said county of Larimer, wherein the said John Arthur was plaintiff and this petitioner was defendant, or in any action whatever, a judgment or decree of divorce was rendered by said court or entered of record therein whereby the marriage relation previously existing between the said parties was adjudged to be dissolved, annulled, or held for naught or the said John
56 Arthur or this petitioner wholly or at all absolved or released from all or any obligations on account of the same; and this petitioner avers that the aforesaid pretended judgments and decrees of divorce were absolute nullities, and that the supreme court of this State by its opinions and judgments heretofore rendered in this case have so declared, and have adjudged both of said pretended judgments and decrees of divorce to be absolutely null and void and without any effect whatever to dissolve the marriage relations which existed between the said parties in the lifetime of the said John Arthur; and this petitioner avers that said judgments of said supreme court constitute the law of this case in that behalf, and that said defendant is thereby estopped from saying that this petitioner was not the widow of the said John Arthur when he died.

And this petitioner avers that she is a citizen of the United States and a citizen of the State of Colorado, and, as widow of said John Arthur, deceased, as aforesaid, she became at his death the sole heir of his said estate, consisting of certain lands, tenements, and hereditaments and personal property at the said county of Larimer, and as such heir-at-law of him, the said John Arthur, the said lands, tenements, and hereditaments immediately vested in her and she is now and ever since has been seized of the same and entitled to the possession, use, and enjoyment of the same; that the personal estate of him, the said John Arthur, was and is more than sufficient to pay all the debts of him, the said John Arthur, and that she, the said petitioner, as such sole heir, is the sole distributee of the said personal estate after the payment of said debts and the cost of administration, and the same and the right thereto became thereupon vested in her and thence hitherto has been vested in her as an indefeasible right guaranteed to her by the laws and constitution of the State of Colo-
57 rado and by the Constitution of the United States, and that she has never been summoned or impleaded in any court or action in which any of her said rights or property have been adjudged lost, forfeited, or taken from her by any due process of law; that the supreme court of this State in its judgments heretofore rendered has declared and adjudged that this petitioner was the widow of the said John Arthur at the time of his decease, and that such decisions constitute the law of this case, and that by virtue of the laws of the State of Colorado she is, as such widow, the sole heir of him, the said John Arthur; that a judgment of this court dismissing her said petition and giving her said property to others would, if affirmed by the supreme court of this State, be the taking of her private property without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States; that a judgment of this court dismissing her said petition for the commission of supposed crimes averred in said supplemental answer to have been committed by her would, if affirmed by the supreme court of this State, constitute an *ex post facto* law of the State of Colorado, in contravention of section ten, article one, of the Constitution of the United States; that a judgment of this court dismissing her said petition for the supposed crimes alleged in said supplemental answer to have been committed by her would, if affirmed by the supreme court of this State, constitute a law of attainder of the State of Colorado, in contravention of section ten, article one, of the Constitution of the United States; that a judgment of this court dismissing her said petition and transferring her said property to others would, if affirmed by the supreme court of this State, constitute an act of judicial legislation without the sanction of law
58 and against the rights of this petitioner guaranteed to her by both the constitution of this State and the Constitution of the United States.

And this petitioner denies that after the said pretended decrees of divorce were rendered she, with full or any knowledge that they had been rendered or otherwise or at all, ratified or affirmed or as-

sented to or acquiesced in the same or either of them; denies that there were any decrees to ratify, affirm, assent to, or acquiesce in, and avers that the pretended judgments and decrees of divorce mentioned in said amended and supplemental answer were *nil* and could not be ratified or affirmed or assented to or acquiesced in by her.

Denies that said pretended judgments or decrees of divorce had or were of any force or virtue; denies that in the lifetime of the said John Arthur, by force and virtue of said pretended decrees or under or in pursuance thereof or otherwise, she entered voluntarily or otherwise into a contract of marriage with one James H. Israel; denies that she caused or procured any contract of marriage to be duly or legally or at all solemnized between herself and the said James H. Israel in the lifetime of the said John Arthur; denies that any contract of marriage could have been duly and legally solemnized between her and the said James H. Israel in the lifetime of her late husband, the said John Arthur, deceased; and this said petitioner denies that in the lifetime of said John Arthur, upon the supposed knowledge that the said pretended decrees of divorce had been rendered coming to the said petitioner and the said James H. Israel, she desired to use the said supposed privilege conferred by said pretended decrees or to accept the supposed benefit thereof, and denies that she procured a marriage to be solemnized between her and the said James H. Isreal in the lifetime of her late husband, John
59 Arthur, deceased, and she avers that said pretended decrees of divorce conferred no privilege she could use and provided no benefits whatever which she could have accepted.

And this petitioner denies that she and the said James H. Israel went away from the place where they were living, in southern Colorado or elsewhere, to some place unknown or remote therefrom or to any place or were married secretly or privately in due form of law in the lifetime of said John Arthur, as stated in said amended and supplemental answer, or otherwise; and this petitioner denies that in July, 1881, or at any time she admitted or confessed to certain confidential friends of hers at Fort Collins or to any persons at any place, under injunctions of secrecy or otherwise, that she had been duly or at all married to the said James H. Israel after the rendition of the said pretended decrees and in the lifetime of said John Arthur.

And, further replying to the said amended and supplemental answer of the said James B. Arthur, administrator, this petitioner alleges and states the facts to be that the aforesaid estate of the said John Arthur, deceased, is in large part the product of the individual money and property of this petitioner, which was invested on or about the first of July, 1863, by herself and the said John Arthur in the cattle business in this State (then Territory of Colorado), to wit, the sum of one thousand dollars, and that by the joint labors of this petitioner and the said John Arthur in said business for the space and period of twelve years, by the aid and use of said money and property so invested as aforesaid, the said estate inclusive of her said money and property was earned and accumulated, and all of

said estate so earned and accumulated was held in the name of the said John Arthur at the time of his decease.

60 And this petitioner avers that the separation of this petitioner and the said John Arthur in his lifetime is a matter of interest strictly confined to this petitioner and the said John Arthur and in nowise affects the said James B. Arthur, administrator, or any other person or persons; that she had at all times during the lifetime of the said John Arthur an interest, right, and property in the said property and estate so held by him and which was in part, as aforesaid, the result of her efforts, labor, and toil and in part the accumulation and increment of her own private capital and separate estate, and that at the time of the decease of him, the said John Arthur, she had never been summoned or impleaded nor had she appeared in any court or action where her said right and interest had been adjudged or decreed lost or forfeited, nor had she then nor has she since been deprived of the same by any process of law, and that upon the death of him, the said John Arthur, her said right, as well to the portion which was before that time equitably hers and as well to the balance, became fixed and determined, and that she cannot be deprived of the same or any part thereof except by the law of the land, and that the said James B. Arthur has no interest, legal or equitable, in said estate, nor has any other person soever except this petitioner.

ABBIE A. ISRAEL,
By S. B. A. HAYNES,
Her Attorney.

(Endorsed:) State of Colorado, Larimer county, *ss:* In the matter of the estate of John Arthur, deceased. Replication of Abbie A. Israel, petitioner, to the amended and supplemental answer of James B. Arthur, adm'r. Filed in county court Jan. 27, 1891. Newt. C. Garbutt, clerk. S. B. A. Haynes, att'y for petitioner.

61–98 STATE OF COLORADO, }
County of Larimer, } *ss:*

In the County Court.

ABBIE A. ISRAEL, Petitioner,
vs.
JAMES B. ARTHUR, Administrator, etc., Respondent.

In the matter of the estate of John B. Arthur, deceased. Petition for distribution.

Bill of Exceptions.

Be it remembered that on the 8th day of June, 1891, the same being one of the regular judicial days of the regular June term, 1891, of the above-entitled court, the above-entitled cause came on in its order for trial before the said court.

Thereupon on behalf of the petitioner it was stipulated and admitted by the respondent that the decree- set up in the respondent's

amended and supplemental answer were rendered as therein alleged, and that the same are and were void when rendered, and that the only question now being tried is as to whether the plaintiff is estopped by her conduct as alleged in said answer to dispute or contest the validity of said decrees or whether she has ratified them by her conduct.

And then, to sustain the issues on his behalf, the said respondent introduced the following testimony.

* * * * * * *

99 UNITED STATES OF AMERICA:

STATE OF COLORADO, } ss:
County of Larimer, }

In the County Court, in Probate, December Term, A. D. 1890.

Pleas before the Honorable H. I. Garbutt, judge of the county court of Larimer county, in the State of Colorado, at a term thereof begun and holden at the court-house, in the city of Fort Collins, in said county, on the 29th day of December, A. D. 1890, and of the Independence of the United States the one hundred and fourteenth.

Present: H. I. Garbutt, judge; Thomas H. Davy, sheriff.

Attest: NEWT. C. GARBUTT, *Clerk.*

Be it remembered, to wit, that heretofore and on the 30th day of December, A. D. 1890, the same being one of the days of the December term, A. D. 1890, of the said county court, the following proceedings, *inter alia*, were had and entered of record, to wit:

100 ABBIE A. ISRAEL
vs.
JAMES B. ARTHUR, Administrator of the Estate of John Arthur, Deceased. } (Case Number 826.)

At this day comes the said defendant, by E. A. Ballard and Robinson & Love, his attorneys, and the said petitioner, by S. B. A. Haynes, her attorney, also comes, and thereupon comes on to be heard the defendant's motion to redocket this cause, and it appearing to the court by the remittitur of the honorable supreme court on file herein that the judgment heretofore rendered herein by this court has been by our supreme court reversed, annulled, and altogether for naught held, and that the same has been by the supreme court duly remanded to this court for further proceedings according to law, it is considered by the court now here that said motion be, and the same is, granted.

It is therefore ordered by the court that this cause be redocketed upon the records of this court, and that it retain its original docket number, to wit, number 826.

Upon the application of the said petitioner by her said attorney it is ordered by the court that she have leave and time and thirty

days from this date in which to file her replication to the defendant's supplemental answer herein.

That afterwards and on the 5th day of June, A. D. 1891, the same being one of the regular days of the May term, A. D. 1891, of said county court, the following proceedings were had and entered of record, to wit:

101 ABBIE A. ISRAEL
vs.
JAMES B. ARTHUR, Administrator of the Estate of John Arthur, Deceased. } (Number 826.)

Now, on this day, comes the respective parties, by their attorneys stipulating thereto, it is ordered that this matter be set for trial for June 8th, A. D. 1891, at 1.30 o'clock in the afternoon. Ordered, further, that the respective parties herein pay to the clerk of this court $15.00 each as advanced fees in this cause.

That afterwards and on the 8th day of June, A. D. 1891, the same being one of the regular days of the May Term, A. D. 1891, of said county court, the following proceedings, *inter alia*, were had and entered of record, to wit:

ABBIE A. ISRAEL
vs.
JAMES B. ARTHUR, Administrator of the Estate of John Arthur, Deceased. } (Case Number 826.)

Now, on this day, this matter coming on to be heard, comes the plaintiff, by the Honorable W. S. Decker, her attorney, and the defendant, by the Honorable Luther Dixon, E. A. Ballard, and Robinson & Love, his attorneys, also comes; the court sits and hears the evidence on the part of the plaintiff, as well as that on the part of the defendant, and the argument of counsel in part, and, the hour of adjournment coming on, it is ordered by the court that this matter stand continued for further hearing until to-morrow morning at eight o'clock in the forenoon.

102 That afterwards and on the 9th day of June, A. D. 1891, the same being one of the regular days of the June term, A. D. 1891, of said county court, the following proceedings, *inter alia*, were had and entered of record, to wit:

ABBIE A. ISRAEL
vs.
JAMES B. ARTHUR, Administrator of the Estate of John Arthur, Deceased. } (Number 826.)

Now comes again the parties herein, by their respective attorneys, and this matter is again taken up according to continuance and counsel complete their argument and submit the case to the court, and the court, now not being fully advised in the premises, doth take this matter under advisement until Tuesday, June 23d, A. D. 1891.

That afterwards and on the 23d day of June, A. D. 1891, the same being one of the regular days of the May term, 1891, of said county court, the following proceedings, *inter alia*, were had and entered of record, to wit:

ABBIE A. ISRAEL
vs.
JAMES B. ARTHUR, Administrator of the Estate of John Arthur, Deceased. } (Number 826.)

At this day comes again the said petitioner, by S. B. A. Haynes, Esq., one of her attorneys, and the respondent, by E. A. Ballard and Robinson & Love, his attorneys, also come, and the court having heretofore heard the evidence and argument of counsel herein and having taken this case under consideration for further advise-
103 ment and having duly considered the same, being now fully advised in the premises, doth, upon the pleadings, stipulation, and evidence, find in favor of the respondent, and that the petitioner, Abbie A. Israel, of right ought to be and is estopped to aver or claim that she is the widow or heir of the said John Arthur, deceased, or the distributee of his estate.

Wherefore it is considered, adjudged, and decreed by the court that the petition of the said petitioner be, and hereby is, denied and dismissed. It is further ordered by the court that the respondent, James B. Arthur, administrator of the estate of the said John Arthur, deceased, do have and recover of and from the petitioner, Abbie A. Israel, his costs in this behalf expended, to be taxed, for which let execution issue.

That afterwards and on the 23d day of June, A. D. 1891, the same being one of the regular days of the June term, A. D. 1891, of said court, the following proceedings, *inter alia*, were had and entered of record, to wit:

ABBIE A. ISRAEL
vs.
JAMES B. ARTHUR, Administrator of the Estate of John Arthur, Deceased. } (Number 826.)

And now, on this day, comes the petitioner, by S. B. A. Haynes, T. J. O'Donnel, and W. S. Decker, her attorneys, and excepts to the judgment and decree of the court this day announced, and pray-time in which to prepare and tender a bill of exceptions; which is accordingly granted, and time and sixty days are given in which to prepare and tender such bill, which, when signed and sealed by the judge of this court, may be filed herein as of this date.

104 That afterwards and on the 21st day of October, A. D. 1891, the same being one of the regular days of the September, 1891, term of said court, the following proceedings, *inter alia*, were had and entered of record, to wit:

ABBIE A. ISRAEL, Petitioner,
vs.
JAMES B. ARTHUR, Administrator, etc. } (Number 820.)

On this day it appearing to the court that the bill of exceptions which was on the 28th of July, 1891, signed and sealed by the judge of this court was on the 30th day of said month filed and become a part of the records in said cause, and it appearing to the court that said bill of exceptions does not contain exceptions which were taken in open court to the finding and judgment which were made and entered by the court on the 23rd day of June, A. D. 1891, which said exceptions were taken when said judgment was entered:

Now, therefore, on motion of the petitioner and by consent of the respondent, James B. Arthur, administrator, by L. S. Dixon, Esq., his attorney, it is ordered that the bill of exceptions be amended so as to contain the following, to wit:

"And afterwards and on the 23rd day of June, 1891, the said court found the issues for James B. Arthur, administrator, respondent, and entered judgment for said respondent; to which finding and judgment Abbie A. Israel, the petitioner, then and there excepted."

By the court:

H. I. GARBUTT, *Judge.*

105 I, Newt. C. Garbutt, clerk of the county court of Larimer county, in the State of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all journal entries in a certain cause pending in said court, on the probate side thereof, wherein Abbie A. Israel is petitioner and James B. Arthur, administrator of the estate of John Arthur, deceased, is respondent, together with true, perfect, and complete copies of the petition of Abbie A. Arthur, the answer of James B. Arthur, administrator, thereto; the reply of petitioner to answer of respondent, the amendment and supplement to the original petition, answer to amendment and supplement to petition, amended and supplemental answer of James B. Arthur, demurrer of Abbie A. Israel to the answer of James B. Arthur, answer of James B. Arthur, administrator, to amendment and supplement to original petition, replication of Abbie A. Israel to answer of James B. Arthur, administrator; amended replication of Abbie A. Israel to the amended and supplemental answer, depositions of Elizabeth A. Rogers, also original depositions of Abbie A. Israel and James Israel, and the bill of exceptions.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Fort Collins, this 21st day of October, A. D. 1891.

NEWT. C. GARBUTT,
Clerk of County Court, Larimer County, Colo.,
By JOHN C. HANNA, *Deputy.*

(Endorsed:) No. 3057. In supreme court, State of Colorado. Abbie A. Israel, plaintiff in error, *vs.* James B. Arthur, defendant in error.

Transcript of record, bill of exceptions, and assignments of errors. Filed in supreme court this 16th day of November, 1891. James A. Miller, clerk.

106 STATE OF COLORADO:

In the Supreme Court.

ABBIE A. ISRAEL, Petitioner, etc., Plaintiff in Error,
vs.
JAMES B. ARTHUR, Administrator, etc., Respondent, Defendant in Error.
} Assignment of Errors.

Now comes the said Abbie A. Israel, by T. J. O'Donnell and W. S. Decker, her attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. That the finding and judgment of the court is manifestly against the evidence.

2nd. That there is no evidence to sustain the finding and judgment of the court.

3rd. That the finding and judgment of the court is contrary to law.

T. J. O'DONNELL,
W. S. DECKER,
Attorneys for Plaintiff in Error.

(Endorsed:) In the supreme court. Israel *vs.* Arthur. Assignment of errors. T. J. O'Donnell & W. S. Decker, attorneys for pl'ff in error.

107 And afterwards and on the same day, to wit, November 16th, A. D. 1891, the same being one of the juridical days of the September, A. D. 1891, term of said supreme court, there being present Joseph C. Helm, chief justice; Victor A. Elliott, Charles D. Hayt, judges; Joseph H. Maupin, attorney general; F. A. Richardson, bailiff, and James A. Miller, clerk, the following proceedings were had and entered of record in said cause in said supreme court, to wit:

ABBIE A. ISRAEL, Plaintiff in Error,
vs.
JAMES B. ARTHUR, Administrator, etc., Defendant in Error.
} No. 3057. Error to County Court, Larimer County.

This cause coming on for hearing, upon the motion of plaintiff in error for a supersedeas herein and upon consideration thereof and being now fully advised in the premises, it is ordered by the court that said motion be, and the same is hereby, overruled.

And thereupon and on the same day last aforesaid there was issued and filed in said cause by the clerk of said supreme court a writ of error; which said writ and the endorsements thereon are as follows, to wit:

ABBIE A. ISRAEL, Petitioner,
vs.
JAMES B. ARTHUR, Administrator, etc. } (Number 820.)

On this day it appearing to the court that the bill of exceptions which was on the 28th of July, 1891, signed and sealed by the judge of this court was on the 30th day of said month filed and become a part of the records in said cause, and it appearing to the court that said bill of exceptions does not contain exceptions which were taken in open court to the finding and judgment which were made and entered by the court on the 23rd day of June, A. D. 1891, which said exceptions were taken when said judgment was entered:

Now, therefore, on motion of the petitioner and by consent of the respondent, James B. Arthur, administrator, by L. S. Dixon, Esq., his attorney, it is ordered that the bill of exceptions be amended so as to contain the following, to wit:

"And afterwards and on the 23rd day of June, 1891, the said court found the issues for James B. Arthur, administrator, respondent, and entered judgment for said respondent; to which finding and judgment Abbie A. Israel, the petitioner, then and there excepted."

By the court:

H. I. GARBUTT, *Judge.*

105 I, Newt. C. Garbutt, clerk of the county court of Larimer county, in the State of Colorado, do hereby certify the above and foregoing to be a true, perfect, and complete copy of all journal entries in a certain cause pending in said court, on the probate side thereof, wherein Abbie A. Israel is petitioner and James B. Arthur, administrator of the estate of John Arthur, deceased, is respondent, together with true, perfect, and complete copies of the petition of Abbie A. Arthur, the answer of James B. Arthur, administrator, thereto; the reply of petitioner to answer of respondent, the amendment and supplement to the original petition, answer to amendment and supplement to petition, amended and supplemental answer of James B. Arthur, demurrer of Abbie A. Israel to the answer of James B. Arthur, answer of James B. Arthur, administrator, to amendment and supplement to original petition, replication of Abbie A. Israel to answer of James B. Arthur, administrator; amended replication of Abbie A. Israel to the amended and supplemental answer, depositions of Elizabeth A. Rogers, also original depositions of Abbie A. Israel and James Israel, and the bill of exceptions.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Fort Collins, this 21st day of October, A. D. 1891.

NEWT. C. GARBUTT,
Clerk of County Court, Larimer County, Colo.,
By JOHN C. HANNA, *Deputy.*

(Endorsed:) No. 3057. In supreme court, State of Colorado. Abbie A. Israel, plaintiff in error, *vs.* James B. Arthur, defendant in error.

Transcript of record, bill of exceptions, and assignments of errors. Filed in supreme court this 16th day of November, 1891. James A. Miller, clerk.

106 STATE OF COLORADO:

In the Supreme Court.

ABBIE A. ISRAEL, Petitioner, etc., Plaintiff in Error,
vs.
JAMES B. ARTHUR, Administrator, etc., Respondent, Defendant in Error.
} Assignment of Errors.

Now comes the said Abbie A. Israel, by T. J. O'Donnell and W. S. Decker, her attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. That the finding and judgment of the court is manifestly against the evidence.

2nd. That there is no evidence to sustain the finding and judgment of the court.

3rd. That the finding and judgment of the court is contrary to law.

T. J. O'DONNELL,
W. S. DECKER,
Attorneys for Plaintiff in Error.

(Endorsed:) In the supreme court. Israel *vs.* Arthur. Assignment of errors. T. J. O'Donnell & W. S. Decker, attorneys for pl'ff in error.

107 And afterwards and on the same day, to wit, November 16th, A. D. 1891, the same being one of the juridical days of the September, A. D. 1891, term of said supreme court, there being present Joseph C. Helm, chief justice; Victor A. Elliott, Charles D. Hayt, judges; Joseph H. Maupin, attorney general; F. A. Richardson, bailiff, and James A. Miller, clerk, the following proceedings were had and entered of record in said cause in said supreme court, to wit:

ABBIE A. ISRAEL, Plaintiff in Error,
vs.
JAMES B. ARTHUR, Administrator, etc., Defendant in Error.
} No. 3057. Error to County Court, Larimer County.

This cause coming on for hearing, upon the motion of plaintiff in error for a supersedeas herein and upon consideration thereof and being now fully advised in the premises, it is ordered by the court that said motion be, and the same is hereby, overruled.

And thereupon and on the same day last aforesaid there was issued and filed in said cause by the clerk of said supreme court a writ of error; which said writ and the endorsements thereon are as follows, to wit:

108 STATE OF COLORADO, } ss:
Supreme Court, }

The People of the State of Colorado to the clerk of the county court of Larimer county, Greeting:

Because in the record and proceedings, as also in the judgment, in a suit which was lately in the county court of Larimer county, before the judge thereof, between Abbie A. Israel, plaintiff, and James B. Arthur, administrator of the estate of John Arthur, deceased, defendant, of a plea of —, manifest error hath intervened, as it is said, to the great injury of the said Abbie A. Israel, as we are informed, *and* we, being willing that the said error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if final judgment has been rendered, that you send to the justices of our supreme court, at Denver, in said State, with all convenient dispatch, a true copy of all the proceedings therein, together with a complete and perfect transcript of the record and proceedings of the suit aforesaid, with all things concerning the same, distinctly and openly, under the seal of your court, together with this writ, so that the said justices may have them at the place of holding the said supreme court, in Denver, on the second Monday of January, A. D. 1892, that, the record and proceedings aforesaid being inspected, they may cause to be done thereupon for correcting that error what of right, according to law and the rules of said court, ought to be done.

Witness the Honorable Joseph C. Helm, chief justice of our said supreme court, and the seal thereof, affixed at my office, in [SEAL.] the city of Denver, this sixteenth day of November, A. D. 1891.

JAMES A. MILLER,
Clerk of Supreme Court,
By EDWARD M. COOKE, *Deputy.*

109 [Endorsed:] No. 3057. Supreme court. Writ of error. Israel, plaintiff in error, *vs.* Arthur, defendant in error. Filed in supreme court Nov. 16, 1891. James A. Miller, clerk.

110 And upon the same day as last aforesaid a writ of *scire facias* issued out of said supreme court; which said writ and the endorsements thereon *is* as follows, to wit:

111 STATE OF COLORADO, } ss:
Supreme Court, }

The People of the State of Colorado to the sheriff of Larimer county, Greeting:

Because in the records and proceedings and also in the rendition of the judgment in a suit which was lately in the county court of Larimer county, before the judge thereof, between Abbie A. Irsael, plaintiff, and James B. Arthur, administrator of the estate of John

Arthur, deceased, defendant, manifest error hath intervened, as it is said, to the great injury of the said Abbie A. Israel, as by this complaint we are informed, a transcript of the record and proceedings of which said judgment we have caused to be brought into our supreme court of the State of Colorado, before the justices thereof, to correct the error in the same, if any there be, in due form and manner according to law, we therefore command you to summon the said James B. Arthur, administrator of the estate of John Arthur, deceased, to be and appear before the justices of our said supreme court at the next term thereof, to be holden at Denver, in said State, on the second Monday in January, A. D. 1892, to hear the record and proceedings and errors assigned if he shall think fit, to show cause, if any he can, why the said judgment shall not be reversed for the causes aforesaid, and, further, to do and receive what our said court shall order and adjudge in this behalf; and have you then and there this writ, and make return thereon in what manner you execute the same.

Witness the Honorable Joseph C. Helm, chief justice of our said supreme court, and the seal thereof, at Denver, this sixteenth day of November, A. D. 1891.

JAMES A. MILLER,
Clerk Supreme Court,
[SEAL.] By EDWARD M. COOKE, *Deputy.*

112 [Endorsed:] No. 3057. State of Colorado, supreme court. *Scire facias.* Abbie A. Israel, plaintiff in error, *vs.* James B. Arthur. Filed in supreme court Nov. 25, 1891. James A. Miller, clerk. —— ——, defendant in error. Sheriff's —, $1.35.

STATE OF COLORADO, } ss:
Larimer County, }

I do hereby certify that I have executed this writ on this 20th day of November, A. D. 1891, by delivering to James B. Arthur, administrator of the estate of John B. Arthur, deceased, personally, in the county of Larimer and State of Colorado, a copy of this writ, as I am herein commanded.

THOMAS H. DANY,
Sheriff of Larimer County,
By AVERY BEAN,
Under Sheriff.

113 And on, to wit, the 9th day of December, A. D. 1891, came said defendants in error, by *their* attorneys, and filed in said cause *their* joinder in error in words and figures as follows, to wit:

STATE OF COLORADO, *ss:*

In the Supreme Court, to the January Term, A. D. 1891.

ABBIE A. ISRAEL
vs.
JAMES B. ARTHUR, Administrator, &c. } No. 3057. Error to County Court of Larimer County.

Now comes the said defendant in error, by E. A. Ballard and Robinson & Love, his attorneys, and says that there is no error in the record and proceedings nor in the rendition of judgment by the said county court as assigned herein, and therefore he prays that the said judgment may be affirmed and that his costs may be adjudged to him, etc.

E. A. BALLARD AND
ROBINSON & LOVE,
Attorneys for Defendant in Error.

(Endorsed:) No. 3057. In supreme court, Colorado. Israel *vs.* Arthur. Joinder in error. Filed in supreme court Dec. 9, 1891. James A. Miller, clerk.

And on, to wit, May 12, A. D. 1892, the defendant in error filed in said cause his motion to dismiss the writ of error in words and figures as follows, to wit:

STATE OF COLORADO, *ss:*

In the Supreme Court.

ABBIE A. ISRAEL, Plaintiff in Error,
vs.
JAMES B. ARTHUR, Administrator, &c., Defendant in Error. } No. 3057.

114 Comes now the defendant in error, by E. A. Ballard and Robinson & Love, his attorneys, and moves the court to dismiss the writ of error and proceedings in the above-entitled cause for want of prosecution, for that the plaintiff in error has wholly failed to file briefs herein within the time allowed — the rules of court in that behalf or within the time allowed by orders of court heretofore entered herein or either of them.

E. A. BALLARD AND
ROBINSON & LOVE,
Att'ys for Def't in Error.

(Endorsed:) 3057. Abbie A. Israel, pl'ff in error, *vs.* James B. Arthur, administrator, &c., def't in error. Motion to dismiss. Filed in supreme court May 12, 1892. James A. Miller, clerk. E. A. Ballard, Robinson & Love, for def't in error.

And on, to wit, May 17, A. D. 1892, the same being a juridical day of the April, A. D. 1892, term of said supreme court, there being present Charles D. Hayt, chief justice; Victor A. Elliott,

Joseph C. Helm, justices; Joseph H. Maupin, attorney general; F. A. Richardson, bailiff, and James A. Miller, clerk, the following proceedings were had and entered of record in said cause, to wit:

ABBIE A. ISRAEL, Plaintiff in Error,
vs.
JAMES B. ARTHUR, Defendant in Error.
} No. 3057. Error to County Court Larimer County.

At this day, this cause coming on to be heard upon the motion of plaintiff in error for additional time for filing brief, as
115 also the motion of defendant in error to dismiss the writ of error for failure of plaintiff in error to prosecute said writ under the standing rule and extended time heretofore granted by this court for filing her argument, and upon consideration and being now fully advised in the premises, it is ordered by the court that if plaintiff in error shall pay into court for the use of defendant in error, as a penalty, the sum of twenty-five (25) dollars that said plaintiff in error have leave to file her said argument within fifteen days from this day. It is further ordered by the court that the motion of said defendant in error to dismiss the writ of error herein be, and is hereby, overruled.

And on, to wit, January 17, A. D. 1893, the same being one of the juridical days of the January, A. D. 1893, term of said supreme court—present, Charles D. Hyat, chief justice; Victor A. Elliott and Luther M. Goddard, justices; Eugene Engley, attorney general; F. A. Richardson, bailiff, and James A. Miller, clerk—the following proceedings were had and entered of record in said cause, to wit:

ABBIE A. ISRAEL, Plaintiff in Error,
vs.
JAMES B. ARTHUR, Administrator of the Estate of John Arthur, Deceased, Defendant in Error.
} No. 3057. Error to County Court of Larimer County.

At this day, this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said county court in and for the county of Larimer as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in
116 the proceedings and judgment aforesaid of said county court, it is therefore considered and adjudged by the court that the judgment aforesaid of said county court be, and the same is hereby, affirmed and stand in full force and effect, and that this cause be remanded to said county court for such other and further proceedings according to law as shall be necessary to the final execution of the judgment of said county court in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the court that said defendant in error do have and recover of and from said plaintiff in error his costs in this behalf expended, and that he have execution therefor, and let the opinion of the court filed herein be recorded.

And thereupon and on the day last aforesaid the supreme court

handed down its opinion in said cause, which was filed therein; which said opinion and endorsements thereon *is* in words and figures as follows, to wit:

ABBIE A. ISRAEL, Plaintiff in Error, *vs.* JAMES B. ARTHUR, Administrator, etc., Defendant in Error.	No. 3057. Error to the County Court of Larimer County.

Petition by Abbie A. Israel to the county court to be recognized as the widow and heir of John Arthur, deceased, and to be adjudged sole distributee of his estate, he having died without children. Petition denied. Petitioner brings the record of the proceedings to this court by writ of error.

A sufficient statement of the facts of this litigation will be found in Israel *vs.* Arthur, 7 Colo., 5; and Arthur *vs.* Israel, 15 Colo., 147.

117 *Per Curiam:*

This cause, in different phases, has been several times before this court. In Israel *vs.* Arthur, 7 Colo., 5, the decrees of the county court whereby John Arthur undertook to obtain a divorce from his wife, Abbie, were held to be void for want of jurisdiction. The matter then considered by the court was limited to the question of the validity of said decrees as they appeared of record, and upon the face of the record, without more, the decrees were held insufficient to debar Mrs. Israel from asserting her claim as widow and heir to John Arthur, deceased.

The next time the controversy came before this court (Arthur *vs.* Israel, 15 Colo., 147) the question presented arose upon the demurrer by Mrs. Israel to the amended answer of the administrator, James B. Arthur, resisting her petition to be recognized as the widow and heir of John Arthur. The amended answer set up a new state of facts in connection with said decrees of divorce. The new facts showed Mrs. Israel in a new light and, in the opinion of the court, gave her a different legal status in relation to the controversy. Upon mature consideration the amended answer was held to be sufficient in law to debar or estop her from claiming any property rights as the widow of the said John Arthur, deceased. The court did not change its views of the law as to the facts appearing of record in 7 Colo., *supra*, but simply declared the law applicable to the new state of facts introduced into the record by the amended answer as admitted by the demurrer.

Johnson *vs.* Bailey, 17 Colo.
Dodge *vs.* Gaylord, 53 Ind., 369.

118 Upon the remanding of the cause to the county court Mrs. Israel filed a replication to the amended answer, and upon the issues thus formed a trial was had, resulting in a finding and judgment adverse to her petition. She now brings the record to this court and assigns error to the effect that the finding and judgment of the county court are against the evidence and contrary to the law.

Upon the record now presented, according to the plainest principles governing appellate procedure, the only question for us to determine is whether the evidence upon the last trial was competent to prove the allegations of the amended answer. The court having by its opinion in 15 Colo., *supra*, held the amended answer sufficient in law and the cause having been again tried by the county court in accordance with that opinion, this court, as well as the county court, must regard that opinion as "the law of the case" so far as the matters and things alleged in said amended answer were established by competent evidence to be the true facts of the case.

Lee *vs.* Stahl, 13 Colo., 174.
Routt *vs.* Greenwood Cemetery Co., 18 Colo.

From the record the following facts appear to be undisputed. The dates are material to the understanding of other portions of the evidence:

In 1859 plaintiff in error was married to John Arthur. For some years and up to 1873 she lived with Arthur at or near Fort Collins, Colorado. James H. Israel was in the employ of Arthur for about three years prior to 1873, when he went to Iowa.

In the latter part of 1873 plaintiff in error left her husband and joined Israel and thereafter lived and cohabited with him in Iowa, Missouri, and Kansas, and in southern Colorado, several hundred miles from Fort Collins.

119 On February 9, 1875, a decree of divorce was entered by the probate court of Larimer county in favor of said Arthur against the present plaintiff in error, and on June 12, 1877, a second decree of divorce of like import was also entered in the same court. John Arthur died April 16, 1878.

Other evidence was produced as follows:

Mrs. Elizabeth Sweeney, of Fort Collins, wife of the former sheriff, testified that in 1881 Mrs. Israel told witness that she had been married to Israel three times; that the first was a sham marriage; that the second time was after she heard that Arthur had got a divorce from her, and that the third time was after Arthur died. Witness testified that these statements were made at her house in Fort Collins in 1881, during the occasion of the first trial of this cause, but that witness did not communicate them to counsel for the administrator for some years afterwards.

Mrs. Duncan, mother of Mrs. Sweeney, testified that during the occasion of said first trial Mrs. Israel told witness that she had been married twice to Mr. Israel. Witness did not remember having communicated this statement of Mrs. Israel to any one but her daughter, Mrs. Sweeney.

Mrs. Elizabeth Rogers, of Weld county, an aged lady, testified that she had been acquainted with John Arthur and his wife, Abbie, for many years; that she saw Mrs. Israel at Fort Collins in 1891, when she came to attend the trial; that Mrs. Israel stayed at the house of witness for several weeks during that time; that Mrs. Israel told witness that she had been married twice to Mr. Israel;

that the marriage was after the divorce took place. Witness understood that Mrs. Israel instead of her first husband was the
120 applicant for the divorce. Witness further testified that Mrs. Israel said on that occasion that "she thought she had forfeited her right or claim to the estate of John Arthur and would never have undertaken it (the suit) if other parties had not come and undertaken to carry it through."

The testimony of Mr. and Mrs. James H. Israel was taken by depositions. They concurred in testifying that they never were married to each other until after the death of John Arthur. The following is from the testimony of Mrs. Israel, as set forth in her own printed abstract of the record:

"I was informed by John Arthur in January, 1876, of divorce proceedings to dissolve the marriage relation between him and me. He merely told me that the divorce that he had was not legal, and that I was still his wife as much as ever I was. I never heard of any other divorce proceedings prior to his death. * * *

"In 1873 I ceased to live in Larimer county. Since then I have lived in Adair county, Iowa, about one and a half years. I lived in Cañon City about a year before going to Adair county. The conversation I had with John Arthur was at Cañon City. After leaving Larimer county, besides the places I have mentioned, I lived in Fort Scott, Kan., about three months, and traveled across the plains to Del Norte, Colo., and lived there until I went to Cañon City. During all these years I lived with James H. Israel as his wife and was not known to people with whom I formed acquaintance other than his wife. During that time Mr. Israel and I held ourselves out as husband and wife. This suit was not brought in the name of Abbie A. Israel. There never was any other marriage ceremony performed between Mr. Israel and myself than that
121 on June 18th, 1881. * * * The reason why this marriage between Mr. Israel and me was deferred until June was because I did not think we could be legally married before, not having heard of the second divorce. * * * I know Mrs. Elizabeth Rogers. I met her in Fort Collins in 1881. I did not say to her that I had been married to Israel during the lifetime of Arthur. I have a present interest in this suit. I don't remember that I said to Mrs. Rogers then that I would not have brought the suit if other parties had not come forward and agreed to carry it through. * * * During all the time I lived with Mr. Israel, as I have stated, I performed and discharged all the usual and ordinary duties of a wife to him and cohabited with him as such."

The following is the testimony of Mr. Israel as shown by said printed abstract:

"I became acquainted with petitioner in Larimer county in 1869. I worked for John Arthur about three years before she left his home. I was working for him when she abandoned his home. I never had illicit intercourse with her before she left him. The first illicit intercourse was in December, 1873. We lived together from 1873 to June, 1881, pretty much the same as we have since. I slept and cohabited with her part of the time. After she returned from

Iowa we did not cohabit until we reached Ouray county. She was in Iowa one year or more. She came to Ouray county as Abbie A. Arthur. We had lived in Ouray a very short time when she was called Mrs. Israel. I met her in Wintersett, Iowa, in 1873, when the relations of husband and wife began. I consulted with Mrs. Israel first about her leaving her husband and living with me only by letter. The correspondence was from the latter part of September, 1873. The matter was not talked or considered between
122 us until after she went to Iowa, in August, 1873. Mrs. Arthur began the correspondence. We remained in Wintersett city one night; was four or five days in Kansas City. I arrived in Ouray county June 4th, 1877."

From the testimony of Mr. and Mrs. Israel it appears that their cohabitation was broken off for about a year and a half prior to June, 1877. It was fair for the trial court to infer that this was because Mrs. Arthur was informed in January, 1876, by her husband John Arthur that the first divorce was not legal. Israel's testimony upon this point was: "After she (petitioner) returned from Iowa we did not cohabit until we reached Ouray county. She was in Iowa one year or more. She came to Ouray county as Abbie A. Arthur. We had lived in Ouray a very short time when she was called Mrs. Israel. I arrived in Ouray county June 4th, 1877." This testimony is most significant when it is remembered that the second decree of divorce was entered on June 12, 1877.

In view of all the circumstances of the case—the conduct of the parties—and bearing in mind the repeated declarations of plaintiff in error that she had been married to Mr. Israel more than once, the inference is almost irresistible that they assumed the relation of husband and wife at Ouray in June, 1877, in consequence of learning of the second decree of divorce. It is not strange that the trial court did not consider their denial sufficient to rebut such inference. Though there was no express proof of a formal ceremony of marriage *in facie ecclesiæ* or by a civil magistrate, yet from all the evidence and circumstances of the case the court was warranted in finding that plaintiff in error had actually contracted and consummated a marriage with Israel before the death of her first husband, and so the substance of the issue formed upon the amended complaint was proved.

123 By the brief and argument of counsel for plaintiff in error we are now asked to reconsider the decision announced in 15 Colo., *supra*. It is urged that the decision is contrary to sound legal principles and in violation of rights guarantied by the Constitution of the United States. These views were fully presented when that decision was announced, but upon due consideration were not approved. As before stated, we regard the former opinion as controlling in this particular litigation; hence we shall not enter upon a further discussion of the questions therein considered.

The judgment of the county court is affirmed.

(Endorsed:) No. 3057. In supreme court, State of Colorado. Abbie A. Israel, plaintiff in error, *vs.* James B. Arthur, adminis-

proper consideration by the members of the court either severally or collectively.

On the same day that the opinion in this case was handed down the opinion in the case of The People *vs.* Graves was handed down, and in that opinion we find the following:

"In all criminal prosecutions the law of the land guarantees to every accused person a fair trial and a right to meet the witnesses against him face to face. This plaintiff in error has not had such a trial. Suspicions and statements of the deceased, not even having the sanction of her oath, are put in evidence against him by third parties in violation of fundamental principles. Take away any one of these guarantees and a precedent would be established which, if followed to its legitimate end, would lead to arbitrary punishment, which is inconsistent with our institutions and utterly incompatible with the safety of the citizen."

If the court should apply the principles as above stated to this case it would reach a different result. There are other guarantees besides a fair trial and meeting witnesses face to face which must be sacredly observed before a party can be punished for any offense. In addition to those mentioned by the court, the prosecution must be upon an indictment or information in a court of competent jurisdiction in the county where the offense is alleged to have been committed and a trial by a jury of twelve good and lawful men, and after conviction only the punishment which the law has affixed to the crime can be inflicted.

128 Justice Field, in Cummings *vs.* Missouri, 4 Wall., 277, says:

"The provisions of the Federal Constitution intending to secure the liberty of the citizen cannot be evaded by the form in which the power of the State is exerted. If this were not so, if that which cannot be accomplished by means looking directly to the end can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named against which the framers of the Constitution intended to guard which may not be affected."

Again, in the Mulligan case, 4 Wall., 2, Justice Davis says:

"The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual there is an immunity from punishment, no matter how great an offender the individual may be or how much his crimes may have shocked the sense of justice of the country or endangered its safety. By the protection of the law human rights are secured; withdraw that protection and they are at the mercy of wicked rulers or the clamor of an excited people."

To the discussion of these questions we do not care to add anything which has not already been said in the printed and oral arguments submitted.

T. J. O'DONNELL,
W. S. DECKER,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 3057. In the supreme court of Colorado. Abbie A. Israel, plaintiff in error, *vs.* James B. Arthur, adm'r, &c., defendant in error. Petition for rehearing and brief on same. Filed in supreme court Jan. 26, 1893. James A. Miller, clerk. T. J. O'Donnell & W. S. Decker, attorneys for plaintiff in error.

129 And afterwards and on, to wit, January 30th, A. D. 1893, said day being one of the juridical days of the January, A. D. 1893, term of said court—present, Charles D. Hayt, chief justice; Victor A. Elliott, Luther M. Goddard, justices; Eugene Engley, attorney general; F. A. Richardson, bailiff, and James A. Miller, clerk—the following proceedings were had and entered of record, to wit:

ABBIE A. ISRAEL, Plaintiff in Error, *vs.* JAMES B. ARTHUR, Administrator, etc., Defendant in Error.	No. 3057. Error to the County Court of Larimer County.

At this day, this cause coming on for hearing upon the petition of said plaintiff in error for a rehearing herein, and upon consideration thereof, and being now sufficiently advised in the premises, it is ordered by the court that said petition be, and is hereby, denied.

Whereupon said plaintiff in error, by her attorney, W. S. Decker, Esq., excepted to the judgment of the court heretofore and on January 17th instant entered herein, as also to the opinion of the court filed and the order entered at this day denying the petition for a rehearing.

And upon the motion of said plaintiff in error, by her attorney as aforesaid, it is ordered by the court that the mandate of this court remanding this cause back to the district court of Larimer county be not issued until thirty (30) days after the entry of the final judgment herein.

130 An- on, to wit, February 8, A. D. 1893, said plaintiff in error filed in the office of the clerk of said supreme court her petition for the allowance of a writ of error from the Supreme Court of the United States to said supreme court of Colorado in words and figures as follows, to wit:

In the Supreme Court of Colorado.

ABBIE A. ISRAEL, Plaintiff in Error, *vs.* JAMES B. ARTHUR, Adm'r, etc., Defendant in Error.	Petition for Writ of Error.

To the Honorable Charles D. Hayt, chief justice of the supreme court of the State of Colorado:

Abbie A. Israel, plaintiff in error, your petitioner, respectfully represents that on, to wit, the 17th day of January, 1893, the supreme court of the State of Colorado rendered a final judgment affirming

the judgment of the county court of Larimer county in this cause, and on, to wit, the 30th day of January, 1893, the said supreme court denied a petition for a rehearing which had theretofore been filed in said cause.

Your petitioner represents that said judgment is repugnant to the provisions of the Constitution of the United States—that is to say, by said decision it is found that the plaintiff in error during the lifetime and at the death of John Arthur was his wife and is now his lawful widow, and by virtue of the statute of descent and distribution, there being no children, the whole estate of John
131 Arthur at his death descended to and became the absolute property of the plaintiff in error; that by virtue of said opinion and upon the sole grounds of the plaintiff in error having committed adultery and assumed bigamous relations with one James H. Israel the said property of the plaintiff in error is transferred to the collateral heirs of John Arthur, to wit, his brother and nieces.

Your petitioner therefore says:

1. That said judgment is in violation of the fourteenth amendment to the Constitution of the United States, in this, that it is the taking of property without due process of law.

a. That said prosecution was without indictment or information.

b. In a court without jurisdiction to try such an offense.

c. That she was condemned or convicted and her property forfeited without a trial by jury.

d. That the trial was had in a county other than that in which the offense is alleged to have been committed.

e. That the right to be present at the trial and be confronted with the witnesses for the prosecution were denied the plaintiff in error.

2. That said judgment is in violation of section 1 of article X of the Constitution of the United States, in this:

a. That it provides for the offense of adultery or bigamy another, different, and additional punishment to those which the law provided should be inflicted.

b. That the said judgment has the same effect as a bill of pains and penalties, which is included in the general designation of a bill of attainder, prohibited by said section.

132 Wherefore your petitioner prays that your honor grant a writ of error from the Supreme Court of the United States to the supreme court of the State of Colorado in pursuance of the statute in such case made and provided, and that the said judgment of the supreme court of the State of Colorado may be reviewed by the Supreme Court of the United States.

And your petitioner will ever pray, etc.

T. J. O'DONNELL,
W. S. DECKER,
Attorneys for Abbie A. Israel, Plaintiff in Error.

(Endorsed:) In the Supreme Court of the United States. Abbie A. Israel, plaintiff in error, *vs.* James B. Arthur, adm'r, defendant in error. Petition for writ of error. Filed in supreme court Feb. 8, 1893. James A. Miller, clerk.

STATE OF COLORADO:

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed from said court and that the same be made a supersedeas, the bond in the penal sum of five thousand dollars herewith presented being approved.

In testimony whereof witness my hand this 17th day of February, A. D. 1893.

CHARLES D. HAYT,
Chief Justice of the Supreme Court of the State of Colorado.

133 And on the same date as last aforesaid the said plaintiff in error filed in the office of the clerk of said supreme court her supersedeas bond; which said bond with the approval and endorsements thereon are in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, }
State of Colorado. }

Know all men by these presents that Abbie A. Israel, as principal, and S. B. A. Haynes, Thomas J. O'Donnell, and Westbrook S. Decker, as sureties, are held and firmly bound unto James B. Arthur, administrator of the estate of John Arthur, deceased, in the full and just sum of five thousand dollars, to be paid to the said James B. Arthur, administrator of the estate of John Arthur, deceased; to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this ninth day of February, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at the January term, A. D. 1893, of the supreme court of the State of Colorado, in a suit pending in said court between Abbie A. Israel, plaintiff in error, and James B. Arthue, administrator of the estate of John Arthur, deceased, defendant in error, judgment was rendered against the said Abbie A. Israel, and she, the said Abbie A. Israel, having obtained a writ of error to reverse the judgment, and a citation directed to the said James B. Arthur, administrator of the estate of John Arthur, deceased, citing and admonishing him to be and appear at the Supreme Court of the United States to be held at Washington on the twentieth day of March next:

134 Now, the condition of the above obligation is such that if the said Abbie A. Israel shall prosecute said writ of error to effect and answer all damages and costs if she fails to make good

her plea, then the above obligation to be void; else to remain in full force and virtue.

ABBIE A. ISRAEL. [SEAL.]
S. B. A. HAYNES. [SEAL.]
THOMAS J. O'DONNELL. [SEAL.]
WESTBROOK S. DECKER. [SEAL.]

Approved February 18th, 1893.
CHARLES D. HAYT,
Chief Justice of the Supreme Court of the State of Colorado.

Leave is hereby granted to S. B. A. Haynes, Thomas J. O'Donnell, and Westbrook S. Decker, attorneys of this court, to become sureties on the above undertaking.
Dated Feb'y 18th, 1893.

CHARLES D. HAYT,
Chief Justice of the Supreme Court of the State of Colorado.

135 THE UNITED STATES OF AMERICA, } ss:
State of Colorado, }

S. B. A. Haynes, one of the sureties on the within bond, being first duly sworn, deposes and says that he is worth in property within the State of Colorado the sum of — dollars over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

—— ——.

Subscribed and sworn to before me this — day of February, A. D. 1893.

—— ——,
Notary Public in and for —— County, Colorado.

My commission expires ——, 189–.

THE UNITED STATES OF AMERICA, } ss:
State of Colorado, }

Thomas J. O'Donnell and Westbrook S. Decker, sureties on the within bond, being each first duly sworn, depose and say, each for himself, that he is worth in property within the State of Colorado the sum of five thousand dollars over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

THOMAS J. O'DONNELL.
W. S. DECKER.

Subscribed and sworn to before me this 18th day of February, 1893.

[SEAL.] JOHN S. GIBONS,
Notary Public within and for Arapahoe County, Colorado.

My commission expires July 16, 1896.

(Endorsed:) 3057. Abbie A. Israel, plaintiff in error, *vs.* James B. Arthur, adm'r, etc., defendant in error. Supersedeas bond on writ of error from Supreme Court of United States. Filed in supreme court Feb. 17, 1893. James A. Miller, clerk.

136 STATE OF COLORADO, } *ss:*
Supreme Court, }

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing record contains a true, full, and complete transcript of the record and proceedings of the county court of Larimer county, State aforesaid, sitting in probate, in a certain cause therein, wherein Abbie A. Israel was petitioner and James B. Arthur, administrator of the estate of John Arthur, deceased, was defendant, and which said cause was brought into this court by writ of error to said county court, together with transcripts of the assignment of errors of said plaintiff in error, the order overruling the motion of the plaintiff in error that the writ of error to issue in said cause be made a supersedeas, the writ of error, the *scire facias* to hear errors, the joinder in error of defendant in error, motion to dismiss the writ of error and the order overruling said motion, the judgment of this supreme court, the opinion of the court filed, the petition of plaintiff in error for a rehearing and brief in support thereof, the order denying said petition, exception of plaintiff in error to said judgment and opinion, and the order staying the issue of mandate, the petition of plaintiff in error for the allowance of a writ of error from the Supreme Court of the United States to said supreme court of Colorado, with the allowance thereof endorsed thereon, together with the order making said writ of error a supersedeas, the supersedeas bond and approval thereof; to which said record I have attached the original writ of error and citation, with acknowledgement of service thereof endorsed
137 thereon, and assignments of error in Sup. C't of U. S.; all of which said record and proceedings had in said cause are here produced as fully as the same appear from the records and files of said cause now remaining in my office.

Witness my hand and the seal of said supreme court, affixed at my office, in the city of Denver, this 20th day of February, A. D. 1893.

Seal Supreme Court, State of Colorado.

JAMES A. MILLER,
Clerk Supreme Court, State of Colorado.

Endorsed on cover. Case No. 15,273. Colorado supreme court. Term No., 903. Abbie A. Israel, plaintiff in error, *vs.* James B. Arthur, administrator, &c. Filed March 11th, 1893.

DEC 29 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 903.

ABBIE A. ISRAEL, Plaintiff in Error,

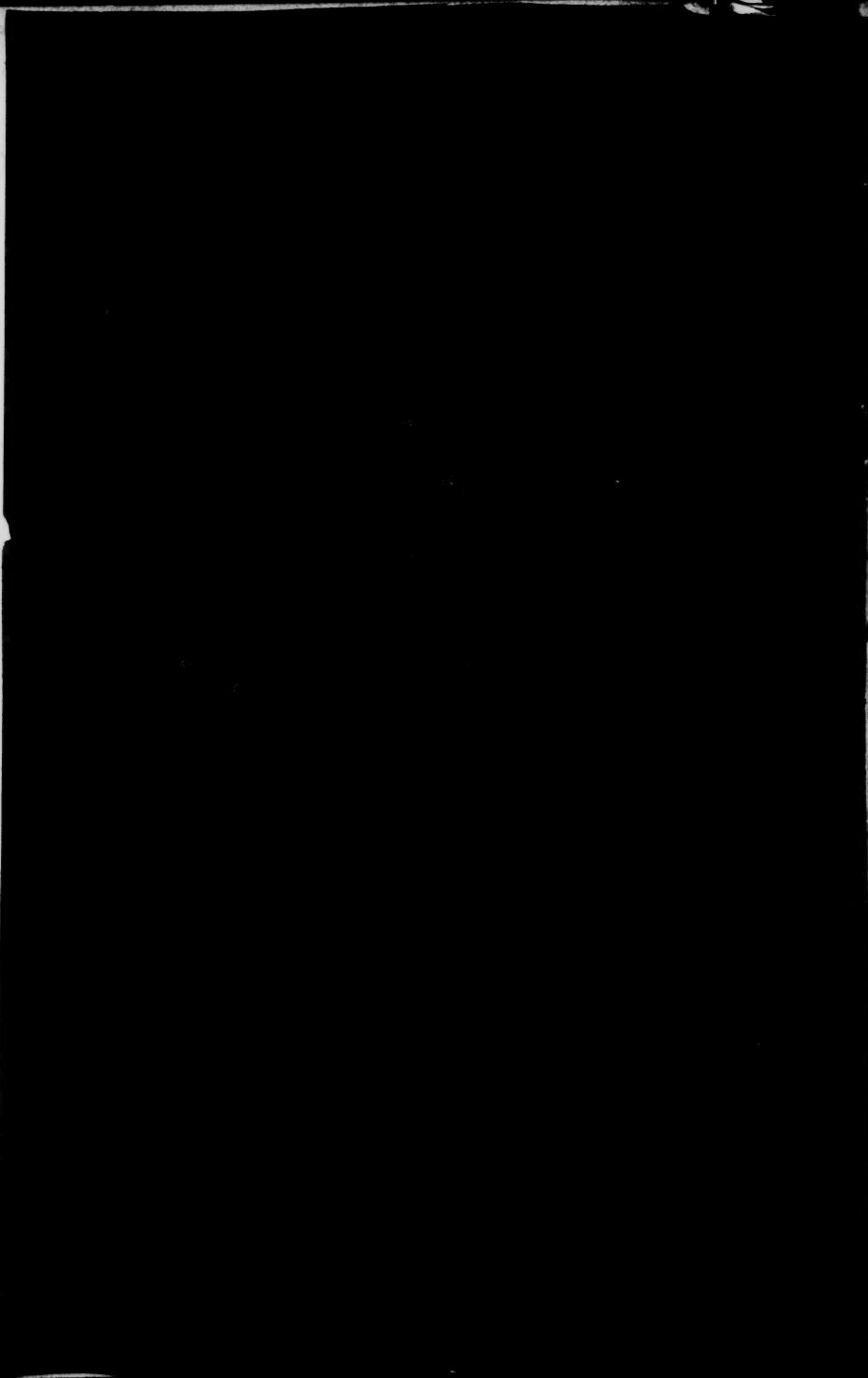
v.

JAMES B. ARTHUR, Administrator of the Estate of JOHN ARTHUR, Deceased.

Motion to Dismiss, with which is united Motion to Affirm.

GEORGE A. KING,
Attorney for Defendant in Error.

BY QUINN, PRT.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

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v.
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Motion to Dismiss, with which is United a Motion to Affirm.

Now comes the defendant in error, James B. Arthur, administrator of the estate of John Arthur, deceased, and moves the court to dismiss the writ of error to the Supreme Court of the State of Colorado in this cause for want of jurisdiction, because no federal question is involved in the record.

And the defendant in error, in pursuance of rule 6, section 5, of the rules of this court, also moves the court in case of denial of the motion to dismiss, that the judgment of the said Supreme Court of the State of Colorado be affirmed, on the ground that although the record may show that this court has jurisdiction, it is manifest that the writ of error was taken for delay only, and that the question on which the jurisdiction of this court depends is so frivolous as not to need further argument.

GEORGE A. KING,
Attorney for Defendant in Error.

BRIEF.

1. Statement of the Case.

This is a writ of error to the Supreme Court of the State of Colorado, and the motion to dismiss is based on the ground that the record discloses no question of a federal character, as required by Section 709 of the Revised Statutes of the United States, to justify a review of the case by this court.

The defendant in error has caused the whole record to be printed, with the exception of the testimony, which is set out in full in the bill of exceptions. As this motion is made on the ground that neither the pleadings in the case, nor the judgment of the court of original jurisdiction, nor the judgment of the Supreme Court of Colorado, involve any federal question, it is manifest that it would be useless to print the testimony, which, of course, could not enlarge the scope of the pleadings or judgment.

The origin of the case is found in a petition, Record, p. 4, of this plaintiff in error, Abbie A. Israel, under the name of Abbie A. Arthur, to the county court of Larimer County, Colorado, in the matter of the estate of John Arthur, deceased, filed May 17, 1881, wherein she set out that said John Arthur died on or about the 16th of April, 1878, leaving no child or other descendants, but leaving her, his wife up to the time of his death, and now his widow, to whom his estate descended, and to whom it vested as her absolute estate, subject to the payment of his debts; that on the 23d of April, 1878, James B. Arthur, defendant in error herein, presented his petition to the judge of said county court for letters of administration, wherein he alleged that said John Arthur left surviving him one brother, James B. Arthur, and four children of a deceased sister, thereby ignoring the relation of the pe-

titioner to the said decedent, and her right to his estate; that although appointed administrator of said estate on that day, said James B. Arthur did not present or exhibit to said court or the judge thereof, any account of his acts and doings as such administrator until the 27th day of October, 1879.

She further complains that although he filed a report on the last-named day, he presented no vouchers for his disbursements, nor bills of sale for the property sold, and that no order had ever been made by the court, or judge thereof, allowing him to sell the personal property of said estate, or any part thereof at private sale. Other acts and doings of the administrator are complained of as contrary to the petitioner's rights, and constituting a breach of his duty as administrator, but as they are in no wise material to the question presented by this motion they are not here summarized.

The petitioner prays, Record, pp. 6, 7, for an order fixing the time for presenting proof of heirship; that upon such proof the administrator be required to pay over to the petitioner the amount of moneys in his hands belonging to the estate; that the administrator be cited to appear and make full and complete disclosures as to his transactions; that the orders heretofore made, approving his accounts, be set aside, and a new account ordered, and the administrator required to settle with the petitioner according to such new account, and for general relief.

The answer of the administrator to this petition, pp. 8, 9, denied the misdoings with which he was charged in the settlement of the estate, and further denied that the petitioner was at the time of the death of said John Arthur, his wife, or is now, or ever was, his widow. It admitted that she had at one time been the wife of said John Arthur, but set up two decrees of divorce rendered by the County Court of Larimer County, Colorado, in favor of

said John Arthur against the petitioner, Abbie A. Arthur, dissolving the bonds of matrimony theretofore existing between them.

To this answer the petitioner, Abbie A. Israel, filed a replication July 1, 1881, Record, pp. 9, 10, denying the rendition of the decrees of divorce set up in the answer of the administrator.

The judgment of the county court on these pleadings does not itself appear in the record.

The next paper in the record is an amendment and supplement to the original petition, pp. 10–22, filed March 30, 1884. By this petition it appears, p. 14, that the judgment of the county court, on the pleadings hereinbefore set forth, was against the petition of Mrs. Israel, and in denial of her claim of heirship, but that that judgment was reversed by the Supreme Court of Colorado, as were also the decrees of divorce of 1875 and 1877, both of which were held to be null and void for want of jurisdiction. The opinion of the Supreme Court of Colorado, p. 44, thus summarizes its action at that time:

"In *Israel* v. *Arthur*, 7 Colo. 5, the decrees of the county court whereby John Arthur undertook to obtain a divorce from his wife Abbie, were held to be void for want of jurisdiction. The matter then considered by the court was limited to the question of the validity of said decrees as they appeared of record, and upon the face of the record, without more, the decrees were held insufficient to debar Mrs. Israel from asserting her claim as widow and heir to John Arthur, deceased."

Thereupon, as just stated, on the 30th of March, 1884, the petitioner, Abbie A. Israel, filed an amendment and supplement to her original petition, pp. 10 to 22, which went into much greater detail as to the alleged misfeasances and wastes of the administrator, and reiterated Mrs.

Israel's claim to the proceeds of the estate as the widow of John Arthur, and for relief against the administrator.

The amended and supplemental answer of James B. Arthur, the administrator, filed April 9, 1884, pp. 22 to 25, admitted that the decrees of divorce were voidable at the option of the petitioner for want of due and legal service upon her, but averred that she was estopped by her own conduct from contesting their validity, on the ground that with full knowledge of their rendition she had become remarried to one James H. Israel.

"He avers that after the said decrees of divorce were so as aforesaid rendered the said petitioner, with full knowledge that they had been so rendered, ratified, affirmed, assented to, and acquiesced in the same and each of them, in this, to wit, in that after the same had been rendered and in the lifetime of the said John Arthur, the said defendant, by force and virtue of the said decrees and under and in pursuance thereof, entered voluntarily into a contract of marriage with one James H. Israel and caused and procured the said contract of marriage to be duly and legally solemnized, and thereunder took upon herself and assumed the relations of wife to the said James H. Israel, and thenceforward and at all times thereafter continuously, by virtue of the said solemnization of said marriage contract, lived and cohabited with the said James H. Israel as his wife until and ever since the death of the said John Arthur." Record, p. 23.

The answer proceeds to set out the particulars of the petitioners's elopement with and marriage to Israel, and to give the reasons why it had been impossible for the administrator to learn the facts in time to plead them to the original petition. Inasmuch, however, as the answer was founded solely upon the ground of estoppel, it is unnecessary here to set out all these circumstances.

In a further supplementary answer, filed on the same day, pp. 25, 26, the administrator denies all the charges made by the petitioner of waste and misfeasance.

A demurrer was filed to this answer April 28, 1884 (pp. 26, 27).

A still further supplementary answer was filed August 25, 1884, pp. 27–29, setting out that the administrator had in all things faithfully, diligently and lawfully discharged the duties of his trust, and in all things faithfully administered the estate, and is ready to make his final report whenever required by order of the court.

To this answer a replication was filed by the petitioner September 23, 1884 (p. 30).

On these pleadings the action neither of the county court nor of the Supreme Court appears by any copies of their judgments in the record. But in the opinion of the Supreme Court of Colorado (p. 44) it appears that that court held that the facts set up in the amended answer of the administrator were sufficient to debar or estop her from claiming any property rights as the widow of John Arthur, deceased. The following is the statement made by that court (p. 44):

"The next time the controversy came before this court (*Arthur* v. *Israel*, 15 Colo. 147) the question presented arose upon the demurrer by Mrs. Israel to the amended answer of the administrator, James B. Arthur, resisting her petition to be recognized as the widow and heir of John Arthur. The amended answer set up a new state of facts in connection with said decrees of divorce. The new facts showed Mrs. Israel in a new light, and, in the opinion of the court, gave her a different legal status in relation to the controversy. Upon mature consideration the amended answer was held to be sufficient in law to debar or estop her from claiming any property rights as the widow of the said John Arthur, deceased. The court did not change its views of the law as to the facts appearing of record in 7 Colo. *supra*, but simply declared the law applicable to the new state of facts introduced into the record by the amended answer as admitted by the demurrer. (*Johnson* v. *Bailey*, 17 Colo.; *Dodge* v. *Gaylord*, 53 Ind. 369.)"

Upon the cause being again remanded to the county court, the petitioner filed a new replication, January 27, 1891, to the answer of the administrator, pp. 31 to 34, wherein she set forth that the alleged decrees of divorce were absolute nullities, and that the Supreme Court of the State had so declared, and that the administrator was thereby estopped from saying that she was not the widow of said John Arthur when he died.

She then set out the following as grounds upon which she claimed to be protected from the defense of estoppel set up by the administrator, p. 32:

"And this petitioner avers that she is a citizen of the United States and a citizen of the State of Colorado, and, as widow of said John Arthur, deceased, as aforesaid, she became at his death the sole heir of his said estate, consisting of certain lands, tenements, and hereditaments and personal property at said county of Larimer, and, as such heir-at-law of him, the said John Arthur, the said lands, tenements, and hereditaments immediately vested in her, and she is now and ever since has been seized of the same and entitled to the possession, use and enjoyment of the same; that the personal estate of him, the said John Arthur, was and is more than sufficient to pay all the debts of him, the said John Arthur, and that she, the said petitioner, as such sole heir, is the sole distributee of the said personal estate after the payment of said debts and the cost of administration, and the same and the right thereto became vested in her as an indefeasible right guaranteed to her by the laws and constitution of the State of Colorado and by the Constitution of the United States, and that she has never been summoned or impleaded in any court or action in which any of her said rights or property have been adjudged, lost, forfeited or taken from her by any due process of law; that the Supreme Court of this State in its judgments heretofore rendered has declared and adjudged that this petitioner was the widow of the said John Arthur at the time of his decease, and that such decisions constitute the law of this case, and that by virtue of the laws of the State of Colorado she is, as such

widow, the sole heir of him, the said John Arthur; that a judgment of this court dismissing her said petition and giving her said property to others would, if affirmed by the Supreme Court of this State, be the taking of her private property without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States; that a judgment of this court dismissing her said petition for the commission of supposed crimes averred in said supplemental answer to have been committed by her would, if affirmed by the Supreme Court of this State, constitute an *ex post facto* law of the State of Colorado, in contravention of section ten, article one, of the Constitution of the United States; that a judgment of this court dismissing her said petition for the supposed crimes alleged in said supplemental answer to have been committed by her would, if affirmed by the Supreme Court of this State, constitute a law of attainder of the State of Colorado, in contravention of section ten, article one, of the Constitution of the United States; that a judgment of this court dismissing her said petition and transferring her said property to others would, if affirmed by the Supreme Court of this State, constitute an act of judicial legislation without the sanction of law and against the rights of this petitioner guaranteed to her by both the Constitution of this State and the Constitution of the United States."

She then proceeded to deny that she had entered into any contract of marriage with James H. Israel in the lifetime of her husband, John Arthur, or that she had ever admitted or confessed that she had been so married, and denied that she either had ratified, or could ratify, confirm, assent to, or acquiesce in the alleged decrees of divorce, the same being totally null and void.

On the 8th of June, 1891, the case came up for trial in the county court, and the following stipulation appears in the bill of exceptions, pp. 34, 35:

"Thereupon on behalf of the petitioner it was stipulated and admitted by the respondent that the decrees

set up in the respondent's amended and supplemental answer were rendered as therein alleged, and that the same are and were void when rendered, and that the only question now being tried is as to whether the plaintiff is estopped by her conduct as alleged in said answer to dispute or contest the validity of said decrees or whether she has ratified them by her conduct."

The bill of exceptions contains a large amount of testimony introduced on the one side and the other to sustain their respective contentions, but as this motion is based on the ground that the issues involved and decided, could in no possible view of them, present a federal question, we have omitted the whole of the testimony in printing the record.

Upon hearing, the county court found in favor of the respondent, the administrator, and adjudged "that the petitioner, Abbie A. Israel, of right ought to be and is estopped to aver or claim that she is the widow or heir of the said John Arthur, deceased, or the distributee of his estate. Wherefore, it is considered, adjudged and decreed by the court that the petition of the said petitioner be, and hereby is, denied and dismissed." P. 37.

This judgment was rendered June 23, 1891, and was taken by writ of error, p. 40, to the supreme court of Colorado. On the 17th of January, 1893, that court rendered its judgment, p. 43, affirming the judgment of the county court. The opinion will be found in the Record, pp. 44 to 47. The evidence is reviewed, and it was held to fully prove the facts set up by the administrator; that these facts constituted an acquiescence in and ratification of the decrees of divorce, and that therefore the defense of estoppel was fully made out.

A petition for rehearing was filed January 26, 1893, pp. 48, 49, setting up various grounds upon which it was claimed that the judgment was in violation of numerous

provisions of the constitutions both of Colorado and of the United States, and a paper called "Suggestions and Brief upon the Petition for Rehearing" is embodied in the Record, p. 49, 50. This petition was denied January 30, 1893, p. 51.

The petitioner then presented, pp. 51, 52, her petition for a writ of error to take the case to this court, which petition was allowed by an order of the Chief Justice of the Supreme Court of the State of Colorado February 17, 1893, as follows (p 53):

"Desiring to give petitioner an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed from said court, and that the same be made a supersedeas, the bond in the penal sum of five thousand dollars herewith presented being approved."

The following assignment of errors is returned with the record (p. 3):

"I. That said judgment is in violation of the fourteenth amendment to the Constitution of the United States, in that it is the taking of property without due process of law.

"*a.* That said prosecution was without indictment or information.

"*b.* In a court without jurisdiction to try such an offense.

"*c.* That she was condemned or convicted and her property forfeited without a trial by jury.

"*d.* That the trial was had in a county other than that in which the offense is alleged to have been committed.

"*e.* That the right to be present at the trial and be confronted with the witnesses for the prosecution were denied the plaintiff in error."

"II. That said judgment is in violation of section 1 of article X of the Constitution of the United States in this:

"*a.* That it provides for the offense of adultery or bigamy

another, different, and additional punishment to those which the law provided should be inflicted.

"*b.* That the said judgment has the same effect as a bill of pains and penalties, which is included in the general designation of a bill of attainder, prohibited by said section."

2. Brief on Motion to Dismiss.

The entire absence of anything remotely approaching the aspect of a federal question from this record is so apparent as almost to require an apology to this court for so long a statement of the facts as has been given. It has been protracted to this length, however, in order to state fairly and fully everything that can possibly appear in this record from which there may be any possible inference of a denial to the plaintiff in error of any right, title or privilege claimed by her under the Constitution of the United States.

True, the replication of the plaintiff in error to the amended and supplemental answer, filed January 27, 1891, did set up (p. 32) that her right to the personal property of her deceased husband was from and after the time of his death an indefeasible right guaranteed to her by the Constitution of the United States, and that to take it from her would be the taking of her property without due process of law, and would constitute an *ex post facto* law, a law of attainder, etc.

It was expressly admitted afterwards, however (p. 35) "That the only question now being tried is as to whether the plaintiff is estopped by her conduct as alleged in said answer to dispute or contest the validity of said decrees, or whether she has ratified them by her conduct."

It is in the light of this stipulation that the allegations or denials of the rights of the plaintiff in error under a numerous array of articles of the Constitution of the

United States must be regarded. In other words the whole question before the court was one of estoppel. It being adjudged by the court and admitted by the parties that the decrees of divorce were null and void of themselves, the next question was whether the plaintiff in error had so accepted the benefit of them as to estop her from afterwards contesting their validity.

In such a case the court will look not at names but at the substance of things, and a claim that every article in the Constitution has been violated will be of no avail if the court can see from the whole record that no question of a federal character was in fact involved.

On this point the remarks of Mr. Chief Justice Chase in *Millingar* v. *Hartupee*, 6 Wall. 258, seem to be in point. He says, pp. 261, 262: "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States. In respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and on looking into the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decision of a State court, that the right claimed did not exist."

In *Hamblin* v. *Western Land Company*, 147 U. S. 531, 532, it was said: "It is doubtful whether there is a federal question in this case. A real, and not a fictitious, federal question is essential to the jurisdiction of this court over the judgment of State courts. *Millingar* v.

Hartupee, 6 Wall. 258; *New Orleans* v. *New Orleans Water Works Co.* 142 U. S. 79, 87. In the latter case it was said that 'the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

It has been distinctly decided, too, that a question of estoppel is in no respect of a federal character, and that a case disposed of on that ground can not be brought to this court by writ of error for review.

In *Adams County* v. *Burlington & Missouri R. R. Co.* 112 U. S. 123, it was said by Mr. Chief Justice Waite, who delivered the opinion of the court (p. 127):

"To give us jurisdiction of a writ of error for the review of the judgment of a State court, it must appear affirmatively, not only that a federal question was raised and presented for decision to the highest court of the State having jurisdiction, but that it was decided, or that its decision was necessary to the judgment that was rendered. The cases to this effect are numerous. *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Chouteau* v. *Gibson*, 111 U. S. 200. This record shows that there were two questions presented by the pleadings, to wit:

"1. Whether the county acquired a title in equity to the lands in dispute under the operation of the swamp-land act, supplemented as it was by the act of March 3, 1857; and

"2. Whether, if it did, it was estopped by its subsequent acts from setting up that title as against the railroad company.

"It may be conceded that the first of these questions was federal in its character, but we are clearly of opinion the second was not. A consideration of no act of Congress was involved in its decision. There was nothing in the swamp-land grant to prevent the county from surrendering the property to the railroad company, if that was

thought best. Under this defense the validity of the original title was not disputed. The claim was that, in legal effect, that title had been ceded to the railroad company, and that the county was in no condition to demand it back. There was no dispute about the federal right itself, but about the consequences of what had been done by the parties in respect to it, after the title had passed in equity from the United States to the county.

"To our minds, for the purposes of the present question, the case is, in all respects, the same as it would be if the dispute had been about the effect of an instrument intended as a conveyance of the property from the county to the company. The controversy is not as to the right to convey, but as to the effect of what has been done to make a conveyance. That depends not on federal, but on State law."

And alluding to the effect of the petition for the writ of error, and its allowance, it is said in the same opinion, p. 129:

"In the petition which was presented to the chief justice of the court for the allowance of a writ of error, it was stated 'that in the pleadings, record, and judgment and decree there were drawn in question' the rights of the county under the swamp-land acts, as well as the construction of the land-grant acts, and that the judgment was against these rights. The chief justice, in his allowance of the writ, certified that he found the statements in the petition to be true, but, if this certificate is to have any effect at all upon this question, it certainly can not be taken as conclusive when the same chief justice in an opinion on file in the case places the decision entirely on the ground of estoppel."

In the case at bar the chief justice of the Supreme Court of the State seems to have had some hesitation in granting a writ of error on such a record, but appears to have been moved to do so by a desire to give the plaintiff in error an opportunity to test the question (p. 53).

In all this it is quite clear that no real question under the Constitution of the United States was involved, for it is almost too plain for argument that whether the plaintiff in error was, or was not, estopped by her conduct from contesting the validity of the alleged divorce was a pure question of State law or of a general character, the decision of which could in no possible view be controlled by provisions of the Constitution of the United States prohibiting *ex post facto* laws, acts of attainder, or the deprivation of property without due process of law. Indeed, the stipulation entered into by the plaintiff in error herself, p. 34, 35, that estoppel was the only question in the case, might itself be regarded as a sufficient admission of record against the existence of any such federal question as is now claimed to exist.

The authorities in support of this position are very numerous. As presenting this point in the most salient forms, the following may be particularly cited: *Murdock* v. *Memphis*, 20 Wall. 590, 636; *Roth* v. *Ehrman*, 107 U. S. 319 (a question of validity of a divorce); *Chouteau* v. *Gibson*, 111 U. S. 200; *Kenney* v. *Effinger*, 115 U. S. 577 (a question of fact); *Martin* v. *Thompson*, 120 U. S. 376; *Chapman* v. *Crane*, 123 U. S. 540; *Stryker* v. *Crane*, 123 U. S. 527; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Quimby* v. *Boyd*, 128 U. S. 488; *Marrow* v. *Brinkley*, 129 U. S. 178 (like this, a question of estoppel); *Manning* v. *French*, 133 U. S. 186; *City and County of San Francisco* v. *Itsell*, 133 U. S. 65; *Beatty* v. *Benton*, 135 U. S. 244; *Beaupre* v. *Noyes*, 138 U. S. 397 (a question of acquiescence in a supposed fraudulent and void proceeding); *Henderson Bridge Co.* v. *Henderson*, 141 U. S. 679, and cases cited at p. 688.

3. Brief on Motion to Affirm.

The same grounds and authorities apply to the motion to affirm. If the court regards the assertions in the replication to the amended and supplemental answer, p. 32, as containing a sufficient averment of rights under the Constitution of the United States to be regarded as raising a question of denial of rights under the Constitution, yet it is clear that it was rightly held that she was not protected by any provision of the Constitution of the United States from being held to be estopped by her conduct from claiming a share in her late husband's estate. She was not on trial for crime, and, therefore, the provisions as to *ex post facto* laws and acts of attainder have no application whatever to the case. As to deprivation of property without due process of law, it can not be denied that a fair hearing was given her on the evidence submitted, and an impartial decision rendered on the question of estoppel. This constitutes due process of law, and completely satisfies the constitutional provisions in that regard.

GEORGE A. KING,
Attorney for Defendant in Error.

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Brief and Argument for Plaintiff in Error,

On Motion of Defendant in Error to Dismiss the Writ of Error and also on the Motion to Affirm.

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As an appendix to this brief and argument, we have printed portions of the statutes of Colorado in force from 1870 to 1880, viz.: Section 1 of the statute of descent and distribution, Section 1 of the statute in relation to divorce and alimony, and the two sections of the Criminal Code having reference to the crimes of bigamy and adultery, also the prior decisions in this case—Arthur vs. Israel,

7 Colo., 5, and Israel vs. Arthur, 15 Colo., 145, to all of which we will hereafter have occasion to refer.

This is a case in which, if the decision of the Supreme Court of Colorado is sustained, the estate of John Arthur, deceased, which upon his death descended to and vested in the plaintiff in error, his widow and sole heir, as her absolute estate, will be taken from her and transferred to others, without her consent and against her will, without any compensation and without anyone having been misled to his or their injury by any act or declaration of the plaintiff in error, but by a judgment which, in effect, is a forfeiture of her property, because of her immoral conduct, in this, that, before the death of John Arthur, her husband, she was guilty of adultery or bigamy.

Statement of the Facts as they appear in the Pleadings and other parts of the Record.

This controversy arose in the following manner: In 1878, John Arthur died and soon thereafter James B. Arthur, the defendant in error, secured letters of administration on the estate of said John Arthur from the County Court of Larimer County, Colorado. The plaintiff in error filed her petition in that Court and proceeding, claiming that she was the wife of John Arthur at the time of his decease and was then his widow; alleging that the administrator was guilty of a wrongful administration of said estate by which the property was being lost or wasted and praying for certain orders to correct the administration of said estate and that she be declared, under the statute, the sole heir and distributee of said estate. The defendant in error, in his answer to this

petition, admitted that the plaintiff in error had been the wife of John Arthur, but denied that she was his wife at the time of his death or was then his widow, and, in support of these allegations, set up two certain decrees of divorce in two different suits, one rendered February 9, 1875, and the other June 12, 1877, both by the County Court of Larimer County, Colorado, which was known as the Probate Court at the time the first decree was rendered. (Printed Record, pages 8 and 9.) A trial was had upon this issue in the County Court and judgment rendered against the plaintiff in error. The case being taken to the Supreme Court, that Court held the decrees of divorce absolutely void and reversed and remanded the case to the County Court. (7 Colo., 5.) The defendant in error then filed his amended and supplemental answer, in which he alleged that in 1875, and again in 1887, in different suits, John Arthur obtained decrees of divorce from the plaintiff in error which were voidable, but which, as we will see hereafter, the Supreme Court of the State declared absolutely void, and that the plaintiff in error, after learning of the decrees of divorce, entered into a contract of marriage with one James H. Israel, and had the same duly solemnized, thereby ratifying the said decrees of divorce. It is further alleged in said answer that in 1873 the plaintiff in error deserted said John Arthur and thereafter, until the decrees of divorce were rendered, lived and cohabited with said Israel in a state of adultery, and that after the decrees were rendered, and after the marriage contract and ceremony, until the death of John Arthur, she lived and cohabited with said Israel as his wife, and that by reason of her conduct she should not be permitted to claim said estate. A demurrer was

interposed to this answer, which was sustained by the County Court. Upon the case being taken to the Supreme Court, that Court still held that the said decrees of divorce were void and not voidable (15 Colo., 151), but held that, by reason of the matters and things in said answer alleged, the plaintiff in error was estopped to claim said estate, and again reversed and remanded the case to the County Court. The plaintiff in error then filed her replication to said amended and supplemental answer, in which, among other things, she alleged that she was the widow of John Arthur, deceased; that immediately upon his death all of his property—real and personal—became vested in her as the sole heir to said estate, subject only to the payment of debts; that from thenceforth the said estate had been vested in her as an indefeasible right guaranteed to her by the Constitution of the United States; that a judgment dismissing the petition of the plaintiff in error would be taking her private property, without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States, and that, such dismissal being because of certain crimes, the judgment would constitute an *ex post facto* law and also a bill of attainder, which includes pains and penalties, contrary to Section 10, Article I., of said Constitution. The case was then tried in the County Court, on the issues formed by the petition, the amended and supplemental answer and the replication. The County Court found that the said "Abbie A. Israel of right ought to be and is estopped to aver or claim that she is the widow or heir of John Arthur, deceased, or a distributee of his estate," and a decree dismissing the petition of plaintiff in error was accordingly entered. (Printed Record, page 37.) This judgment was reviewed

and affirmed by the Supreme Court, the judgment of the Supreme Court and the decision upon which it is based being found in printed Record, pages 43–47.

JURISDICTION IS SHOWN BY THE PLEADINGS.

In the opinion of the Supreme Court of Colorado, it is said:

"By the brief and argument of the plaintiff in error, we are now asked to reconsider the decision announced in 15 Colo., *supra*. It is urged that the decision is contrary to sound legal principles and in violation of rights guaranteed by the Constitution of the United States. These views were fully presented when that decision was announced, but, upon due consideration, were not approved. As before stated, we regard the former opinion as controlling in this *particular* litigation." (Printed Record page 47, fol. 123.)

We have, then, the replication to the amended and supplemental answer, directly raising the constitutional question relied upon, and the solemn utterances of the Supreme Court, that counsel for plaintiff in error have urged that the former decision was contrary to "sound legal principles and in violation of constitutional rights." Under the decisions of this honorable Court, these facts are sufficient to give jurisdiction.

Counsel for defendant in error lays much stress upon the fact that on the trial of the case in the County Court it was stipulated "that the decrees set up in the amended and supplemental answer were rendered as therein alleged, and that the same are and were void when rendered, and that the only question now being tried is as to whether the plaintiff is

estopped by her conduct, as alleged in said answer, to dispute or contest the validity of said decrees, or whether she has ratified them by her conduct." If it were not for the fact that counsel for defendant in error has considered this stipulation of so much importance upon the question of jurisdiction, we would apologize to the Court for saying that the stipulation has reference only to the evidence which was considered important under the amended and supplemental answer and the interpretation given to it by the Supreme Court of Colorado, but has nothing to do with the legal questions involved.

The decrees of divorce, which will be hereafter particularly referred to, being void, and said decrees being the foundation upon which the amended and supplemental answer is predicated and upon which the defendant in error rested his case, the very important question was raised, upon the allegations of said answer and without regard to the evidence introduced, whether, by reason of anything therein alleged, the plaintiff in error could be deprived of her property. Counsel for defendant in error has well said that "the Court will look not at names, but at the substance of things," and so, upon a careful examination of the amended and supplemental answer, with the interpretation given to them by the State Supreme Court, it will be seen that there is an entire absence of any allegation, directly or indirectly, that any person has been misled to his injury by any act or declaration of the plaintiff in error, so that one of the absolute essentials of a legal or equitable estoppel is wanting.

The allegations of the replication, which directly challenge the legal sufficiency of the defense set up by the amended and supplemental answer, on account of its being repugnant to the several

provisions of the Federal Constitution, brings this case clearly within the law so often stated by this honorable Court by which the question of jurisdiction is determined. As said by Chief Justice Waite, in delivering the opinion of the Court in Chouteau vs. Gibson, 111 U. S., 200: "From the beginning it has been held that to give us jurisdiction in this class of cases it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest Court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case." The State Supreme Court has positively stated that it has considered the constitutional questions raised and decided them adversely to the plaintiff in error. Again, in Chapman vs. Goodnow, 123 U. S., 540–549, the Chief Justice, in delivering the opinion of the Court, said: "A right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the rights within Section 709 of the Revised Statutes as if it had been specifically referred to and the right directly refused."

Bridge Proprietors vs. Hoboken Co., 1 Wal., 116.
The Binghampton Bridge, 3 Wal., 51.
Delmas vs. Insurance Co., 14 Wal., 661.
Murray vs. Charleston, 96 U. S., 432.
Beer Co. vs. Massachusetts, 97 U. S., 25.
University vs. People, 99 U. S., 309.

In this case the constitutional question raised by the replication was necessarily involved in the decision of the State Supreme Court. The replication sets up in clear terms an immunity under the constitutional provisions from the defense stated in the said amended answer. Under the issues formed by the pleadings and the opinion of the Supreme Court, it appears that this is a case clearly within the jurisdiction of this Court; that what is denominated an estoppel is not in any sense governed by the law of estoppel, but is in substance and in fact a forfeiture of the property of the plaintiff in error. The motion of the defendant in error, however, being in the alternative—that is, that if the case be not dismissed, that the judgment of the State Court be affirmed—we feel it our duty to present the merits of this controversy quite fully.

The understanding of the State Supreme Court of the amended and supplemental answer is stated in this language by that Court:

"We still adhere to the opinion that the decrees in question were void and not merely voidable; but, assuming such invalidity, and giving to the declaration of this Court reciting that fact all the force and effect of a final adjudication thereof, we feel warranted in holding that petitioner's right to the estate of Arthur may still be inquired of.

"It is to be hoped, for her sake, that the conduct of petitioner is not correctly set forth in the supplemental answer; but the averments of this pleading in that behalf are, by the demurrer, temporarily confessed, and, for the purposes of the present decision, must be treated as true.

"The question, therefore, *now* presented for determination may be stated as follows: When the wife without cause deserts her husband

and home and for years lives in adultery with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continuously lives and cohabits with him as his wife, may she, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void for want of proper service of process and successfully assert against other heirs her right, under the statute of descents and distributions, to the deceased's estate, as his widow?" (15 Colo., 151 and 152.)

Statement of Undisputed Facts.

There are certain questions of fact which are undisputed, viz.:

1st. That the plaintiff in error and John Arthur were married in 1859.

2d. That she lived and cohabited with him until 1873, when she deserted him, and from that time until Arthur's death, lived and cohabited with James H. Israel, as his wife.

3d. That on February 9, 1875, in a certain suit in the Probate Court of Larimer County, Colorado, a decree of divorce was entered, and that on June 12, 1877, in another suit in the same Court, then known as the County Court, another decree of divorce was entered.

4th. That both of said decrees of divorce were void for want of jurisdiction of the Court granting them. This was determined by the Supreme Court of Colorado—Israel vs. Arthur, 7 Colo., 5. (See Record, page 44.)

5th. That John Arthur died April 16, 1878, without children or the descendants of children, leaving real and personal estate.

6th. That the collateral heirs of said John Arthur were one brother—the defendant in error—and four children of a deceased sister.

7th. That on April 23, 1878, James B. Arthur, the defendant in error, was appointed administrator of the estate of John Arthur, deceased, by the County Court of Larimer County, Colorado.

8th. That there is no allegation in the amended and supplemental answer or elsewhere in the pleadings that any person has been misled to his injury by the acts or declarations of the plaintiff in error, nor is there anything in the evidence which, directly or indirectly, tends to prove anything of that sort.

The Decrees of Divorce.

At the last consideration of this case, the Supreme Court affirmed the judgment of the County Court, upon the principles stated in the decision in 15 Colo., pages 151–153, and the principles therein stated will, therefore, be hereafter particularly considered.

That Court, in 7 Colo., 7, speaking of the divorce decrees, said: "Neither the Probate nor the County Court, in these actions, had obtained jurisdiction over the person of defendant. Both were without authority to proceed to judgment, and, consequently, both decrees were absolutely void." When the case was again before the Supreme Court, in its opinion in 15 Colo., 151, it is said: "We still adhere to the opinion that the decrees in question are void, and not merely voidable." The effect of a void judgment is stated by Mr. Freeman,

in his work on Judgments, Section 117, as follows: "A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it are void. The parties attempting to enforce it may be trespassers. The purchaser at a sale by virtue of its authority, finds himself without title and without redress. The first and most material inquiry in relation to a judgment or decree, then, is its validity. For, if it is null, no action on the part of the plaintiff, no inaction on the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any show of the elements of power or validity."

In the case of Voorhees vs. The U. S. Bank, 10 Peters, 475, this Court said: "The line which separates error of judgment from usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate Court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matters adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, *mere waste paper;* there can be no middle character assigned to judicial proceedings which are irreversible for error."

In Campbell vs. McCahan, 41 Ill., 45, the Supreme Court of Illinois states the law, as we consider universally recognized, as follows: The jurisdiction of both the subject matter and of the person is essential to the validity and binding force of a judicial sentence. If either of these jurisdictional

facts is wanting, then the sentence or decree of the Court is void. In such case, the whole proceeding is *coram non judice* and it may be successfully resisted in that or any other Court, in a direct or collateral proceeding. * * * The decree being void, all acts performed under it are void, and all rights claimed as flowing from it are equally void and inoperative."

Godfrey vs. Terry, 97 U. S., 171.
Hollingsworth vs. Barbour, 4 Peters, 466.
Boswell vs. Otis, 9 How., 336.
Webster vs. Reid, 11 How., 437.
Flowers vs. Foreman, 23 How., 132.
Clark vs. Hogle, 52 Ill., 427.
Morton vs. Root, 2 Dill. C. C., 312.
Haywood vs. Collins, 60 Ill., 328.

It is unnecessary to multiply authorities on this principle of law. It is fundamental. A judgment by any Court against an individual without jurisdiction of his person has no validity. As this Court has said, it is "mere waste paper."

The said decrees of divorce being void for want of jurisdiction of the person of the defendant therein, John Arthur and the plaintiff in error were husband and wife for all purposes under the law—after the decrees of divorce were rendered the same as before. Being his wife before, she was his widow after his death. Being the widow, her right to inherit is absolutely determined by the statute of descent and distribution which provides that "If such intestate leaves a husband or wife and no children, nor the descendant of any child, then the whole of the estate of such intestate, real and personal, shall descend to and vest in such surviving husband or wife as his or her absolute estate, subject to the payments of debts," etc.

Under this statute, upon the death of John Arthur, the estate vested in the plaintiff as absolutely as it did in John Arthur before his death. Her immoral conduct before the death of John Arthur cannot in any way change her legal right to said property. Assuming that before Arthur's death she lived in a state of adultery with James H. Israel and contracted and assumed the relation of wife to him, such conduct, while making her liable to prosecution and punishment under the criminal laws of the State, can in no way affect her right to the property. Mr. Bishop says (Section 296, Bishop on Marriage and Divorce): "The offense of having two husbands or two wives at the same time, the one *de jure* and the other *de facto*, is more frequently termed bigamy; though the broader word polygamy seems to be equally applicable, and it has been considered to be and certainly is more appropriate." And this author, in the same section, after giving the cannonist's definition of bigamy, says: "But polygamy, as understood in our criminal law, is a different thing; it is the act of formally entering into marriage with a third person, by one already sustaining this relation with a second person."

It is very clear that the statutes of Colorado in reference to adultery and bigamy are in no way intended to affect the legal rights or relations of the guilty party, but have reference solely to the criminal liability. In other words, the second marriage can in no way change or affect the civil rights existing between the parties to the first marriage, but only make the parties to the second marriage liable to be proceeded against in a Court of criminal jurisdiction.

It is said, in the opinion of the Court in

Gathings vs. Williams, 5 Iredell's Law (N. C.), 487:

"If a man, seized of land, take a wife, and, during the marriage, he taketh another wife, and the husband die, leaving both wives, the latter shall not have dower; because the marriage between them is void. And if a woman takes a husband, and, leaving the same husband, she marries another, who is seized of land, and the second husband dieth, she shall not have dower of his land."

And again it is said: "It may be true that, as respects third persons, people who hold themselves out to be man and wife may be responsible as if they were what they profess to be: as a man may be liable for articles furnished to a woman he calls his wife and lives with, but it can not affect the right of property as between themselves."

Mr. Freeman, in his note to the above case, 44 American Decisions, 54, says:

"No person can marry while the former husband or wife is living. Such second marriage is, by the common law, absolutely null and void."

In Cartwright vs. McGown, 121 Ill., 395 and 396, it is said:

"The marriage of a man and woman, where one of them has a husband or wife by a prior marriage, who is then living and undivorced, is void and not merely voidable. Being a nullity, no decree is necessary to avoid the same. *Reeves* vs. *Reeves*, 54 Ill., 332; *Drummond* vs. *Irish*, 52 Iowa, 41; *Blossom* vs. *Barrett*, 37 N. Y., 434; *James* vs. *James*, 5 Blackf., 141; *Teft* vs. *Teft*, 35 Ind., 44; *Glass* vs. *Glass*, 114 Mass., 563; *Martin* vs. *Martin*, 22 Ala., 86. A void marriage is good for no legal purpose, and its invalidity may be shown in any suit

between any parties, either in the lifetime of the parties thereto or after their death."

Smith vs. Smith, 5 Ohio St., 32.
Williams vs. Williams, 63 Wis., 58.
Edson vs. Edson, 108 Mass., 590.
Hardy vs. Smith, 136 Mass., 328.

In the case of Newland vs. Holland, 45 Tex., 590, after refusing to allow homestead rights to a woman who, in the lifetime of her husband, had deserted him and lived with another man, the Court, upon the question of her right to an interest in the estate, uses the following language:

" But the right of the surviving wife to her interest in the community property, or her distributive portion of the separate estate of her deceased husband, grows out of and depends upon the existence of the marital relation between the parties and not merely upon continued existence of the family. It may be that by the separation the community interest in future gains will cease, but certainly it does now work a forfeiture in such as have been previously acquired. And the mere withdrawal of the wife from the husband and continuance to live separate and apart from him, however unjustifiable and improper her doing so may be, does not operate and cannot be treated as tantamount to a severance of the marital relation. Though the husband may have good cause for annulling the marriage, evidently, unless he chooses to do this, the mere improper and wrongful withdrawal by the wife and her living apart from him cannot have this effect. And if he does not choose, by his will, to deprive her of the distributive interest in his separate estate which the statute gives her, in the absence of any testamentory disposition of his

property by her husband, it is not conceived that the Court has any power to do so."

The case of Cheely vs. Clayton, 110 U. S., 701, came to this Court from the Circuit Court of the United States for the District of Colorado, and in following the law as laid down by the Supreme Court of Colorado, in Clayton vs. Clayton, 4 Colo., 410, and Israel vs. Arthur (this case), 7 Colo., 5, the Court said: "That James W. Clayton was a citizen of Colorado is necessarily implied in the record, and especially in the finding of the Court below that the Territorial Court had jurisdiction to entertain his application for divorce, and it is the very foundation of the argument in support of this writ of error. But the service in proceedings for divorce was exactly the same as was held insufficient to support the jurisdiction of the Court to make a decree in each of the cases in the Colorado Reports above cited."

* * *

"The decree of divorce being void for the insufficiency of the service and the *status* of Clayton and this plaintiff, therefore, that of husband and wife according to the law of Colorado, as declared by its highest Court, she was entitled as his widow to the share which the law of that State gives to a widow in the husband's lands within the State."

The Question of So-called Estoppel.

The question of the effect of void decrees of divorce upon property rights growing out of the marriage relations being settled by the Supreme Court of Colorado in harmony with the law as universally existing wherever the common law is in force, the next and most important question presented by the decision reported in 15 Colo., 147, is as

to whether the plaintiff in error can have said property taken from her and transferred to others (as is done by the decree of the State Court) because of any act on her part which has not led another to act to his prejudice or injury in reference to the property in controversy. While it is true that the Supreme Court in 15 Colo. based its decision solely upon what it assumes to be the law of estoppel, we submit that the great essential elements of estoppel do not appear in either the said answer or the evidence. The Court, in its opinion, however, does not rest its decision upon the essential elements of the law of estoppel, but assumes the right to disregard well established legal principles and determine the rights of the plaintiff in error upon moral grounds. The opinion commences as follows: "The present controversy has been once before submitted to this Court for adjudication. There was then, however, nothing in the record to show that Mrs. Israel, after deserting Arthur and prior to the divorce decrees, had been guilty of immoral conduct, neither was there anything, aside from these decrees, to indicate that she had not, up to the commencement of the proceedings therefor, conducted herself as a good, true and affectionate wife, or that subsequent to the entry thereof, and with a knowledge of the same, she had, during Arthur's lifetime, remarried, and lived and cohabited with another man, as his wife." Further on in said opinion, the Court said of the divorce decrees: "We still adhere to the opinion that the decrees in question were void and not voidable." We submit that the State Court had no right to divest the plaintiff in error of her property for the reasons stated in the opinion.

ESTOPPEL SHOULD BE PLEADED.

It is an indispensable element in the law of estoppel that the party making it must have been misled, and have changed his position to his injury, by reason of the acts or declarations of the party against whom it is invoked.

The State Court has definitely determined that in order to take advantage of an estoppel, the facts upon which it is based must be specially pleaded.

DeVotie vs. McGerr, 15 Colo., 471.
Gaynor *et al.* vs. Clements, 16 Colo., 210.

Not only must every element of an estoppel be specially pleaded, but the facts constituting it must be specifically stated. Justice Elliott, in delivering the opinion of the Court in DeVotie vs. McGerr, *supra*, quoting approvingly what Dr. Bliss has said in his work on code pleading (Sec. 364), says: "Matter of estoppel is equitable in its nature, yet, as forbidding a party to plead the truth, it should be set out with more certainty than will avail in ordinary defenses," and further on in the same section it is said, "A settled rule of pleading is that estoppels must be specifically pleaded, and with great particularity and precision, leaving nothing to intendment. This rule proceeds upon the theory that as an estoppel concludes a party from asserting the truth, all things essential to give the right to shut out the truth should affirmatively appear."

Gilmer vs. Poindexter, 10 How., 257.
Anderson vs. Hubble, 93 Ind., 570.
Noble vs. Blount, 77 Mo., 235.
Warder vs. Baldwin, 51 Wis., 450.

Now, the defendant in error, by the defense interposed, is endeavoring to secure title to real estate and other property, which, under the statutes

of distribution of this State, belongs to the plaintiff in error. It is admitted she was John Arthur's wife and that she is his widow; that, being his widow (there being no children), she is the sole heir to the whole estate of John Arthur, deceased. But it is said that by reason of her conduct she is estopped to assert that which the law says she is entitled to. It must be apparent, therefore, that all the facts which are essential to make a case of estoppel in a case like this should be clearly and specifically stated.

The Facts that Should Be Alleged to Constitute an Estoppel.

In Griffith vs. Wright, 6 Colo., 249, it is said that "The rule is, that in order to constitute an estoppel by conduct, all the essential elements of such an estoppel must be present," and the Court defines the essential elements to be as follows:

"*First* — There must have been a representation or concealment of *material facts*.

"*Second* — The representation must have been made with *knowledge* of the facts, unless the party making the representation was bound to know the facts, or ignorance of them was the result of gross negligence.

"*Third* — The party to whom it was made must have been *ignorant* of the truth of the matter.

"*Fourth* — It must have been made with the *intention* that the other party should act upon it; but gross and culpable negligence upon the part of the party sought to be estopped, the *effect* of which is to fraud on the party setting up the estoppel, supplies the place of intent.

"*Fifth* — The other party must have been *induced* to act upon it."

The persons who are contesting the right of the plaintiff in error to be the distributee of the estate of John Arthur, deceased, are his brothers and children of a deceased sister. They are not claiming that there was any change of conduct produced by reason of any representations, conduct or concealment of the plaintiff in error, or that they, by any deception or inducement of the plaintiff in error, did alter or change their position, so that the first and fifth elements are wanting to create an estoppel, if the case is tested by the above rule.

There is still another subdivision of the general subject of estoppel *in pais*. It is what is known as estoppel by election or inconsistent positions. It seems to us that it is by this subdivision that the case at bar is to be tested.

In the case of Yates vs. Hurd, 8 Colo., 349, Mr. Justice Helm, in speaking for the Court on this subject, said:

"The latter has been defined to be 'an indisputable admission, arising from circumstances'— that the party claiming the benefit of it has, while acting in good faith, been induced, by the voluntary and intelligent action of the party against whom it is alleged, to change his position. (Bigelow Estop., 345.) With reference to the subject of election, Mr. Bigelow has this also to say:

"Whenever *the rights of other parties have intervened* by reason of a man's conduct or acquiescence in a state of things about which he had an election, and his conduct or acquiescence, or even laches was based upon a knowledge of the facts, he will be deemed to have made an effectual election,

and will not be permitted to disturb the state of things, whatever may have been his rights at first. (Id., 508.) * * *

"A careful examination of the foregoing definitions, and of numerous illustrations, discloses the fact that, to constitute this sort of estoppel, the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another; the person invoking the estoppel must have been induced 'to change his position,' or, by reason thereof, 'the rights of other parties (must) have intervened.'"

See also—

Fallon vs. Worthington, 13 Colo., 570.

In Ketchum vs. Duncan, 96 U. S., 659, it is said that an estoppel *in pais* "operates only in favor of a person who has been misled to his injury, and he alone can set it up."

Morgan vs. Chicago and A. M. R. Co., 96 U. S., 716.

And again, in the case of Brant vs. Virginia Coal and Iron Company, 93 U. S., 326, in speaking of equitable estoppel, it is said that "For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury."

Again it is said: "The primary ground of the doctrine is that it would be fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted."

In Coke's Littleton, 352 *b*, it is said that "Every estoppel, because it concludeth a man to allege the truth, must be certain to every intent, and not be

taken by argument or inference," and in the case of Patterson vs. Hitchcock, 3 Colo., 536, it is said that "its enforcement should be carefully guarded and unhesitatingly refused, except when all the elements of estoppel are present." The general principles which govern the doctrine of estoppel are so universally recognized that we will pass from their consideration.

The Legal Status of Husband and Wife as Affecting Property Rights.

The effect of the doctrine announced by the Supreme Court of Colorado, if sustained, unsettles the law which has heretofore existed in relation to the sacred relations of husband and wife and the property rights arising from such relations.

The fact that the plaintiff in error may have conducted herself in such a way as to shock the moral sense of society should have no weight in determining her legal rights. If she was guilty of what is charged against her, the criminal law provides punishment, with the power in the Court, if conviction was had according to law, to fix the punishment according to the intent and malignity shown in the commission of the offenses. It is not for this Court to set up a moral standard by which the rights of citizens are to be measured, when engaged in a civil controversy to determine property rights. If the plaintiff in error has violated any of the criminal laws of the State, the criminal laws and they alone must be invoked to punish her. If she has a legal controversy involving property rights, such rights must be determined by the laws of the State governing them, without any reference to her moral conduct.

The moral sentiment which influenced the Court is highly creditable to its members as in-

dividuals, but sadly out of place when it governs the determination of Judges. The Court found that the widow of John Arthur had been guilty of conduct of which it did not approve, and determined to punish her for her crimes by taking from her that which the law says is hers and transferring it to others. It calls it an *estoppel.* It is, in fact, a punishment.

The moral plane upon which the opinion is prepared would commend it to any body of moralists who were entirely unacquainted with the principles of law. It would be capital reading in the report of a board of church wardens decrying the conduct of a weak and erring man or woman, who had been overcome by the snares and temptations of the world, and declaring forfeiture of membership or expulsion from the congregation. In a judicial decree, in a cause between citizens defining legal rights, it has no place, and when that Court let it control its decision, it ran direct in the face of the Constitution of the United States, which fixes and protects the rights of Abbie A. Israel, though her face were sin-scarred and her soul seared with crime, as much as if her reputation had been such as in Cæsar's opinion did befit Cæsar's wife.

"It is to be hoped, *for her sake*, that the conduct of petitioner is not correctly set forth in the supplemental answer." So begins this moral lecture. Such are premonitory symptoms of this moral disquisition upon the marital relation and inter-sex communication by which a property *status* is to be overthrown. "Where a wife *without cause* deserts her husband and home, and for years lives in adultery with another man," continues this prelude to the sentence about to be inflicted, she shall be punished. *Punished, not as the law declared,*

at the time she committed the offense, but by such punishment as will be adequate according to the moral sense of the Judges who may compose the Court at any time she comes before it in a case involving her property rights. When a wife deserts *without cause*, she must be punished. *Contra*, if there be cause, then, in that case, the adultery and bigamy are excused, according to this judicial school of morality. If, without cause, she desert and commit adultery, she shall be estopped from saying that she was wife, for, if she can say she was wife, death makes her widow and the statute makes her heir. *The estoppel is as and for a punishment.* It is punishment only, though called estoppel.

With the facts that Arthur and the plaintiff in error were legally married in 1859, and the divorce proceedings were void, it must be conceded that the plaintiff in error was the wife of Arthur after as well as before the decrees were rendered, and so continued to the time of his death. When he died, there being no children, the statute, without any reasonable room for doubt, determined that she was his sole heir. It says, "Then the whole of the estate of such intestate, real and personal, shall descend and vest in such surviving 'wife' as her absolute estate, subject to the payment of his debts," etc.

Taking, therefore, the admitted facts in the light of the statute, the plaintiff in error, immediately upon the death of John Arthur, became the absolute owner of his estate, both real and personal, subject to but the one condition. She being the absolute owner of said estate, the defendant in error has invoked the aid of the Court to take the title from her and place it in him and the children of his sister. There is no allegation in

said amended answer that he or the said children have in any way changed their condition upon the strength of the conduct or representations of the plaintiff in error. They have paid no money to her or any one else with the understanding that they were to have the estate. Neither the defendant in error nor those he represents have ever assisted by labor or services or any valuable thing in the accumulation of said property. The estate being vested in her, it cannot, without her consent, be transferred to another. The State, in the exercise of one of the incidents of sovereignty, may, against the wlll of the owner, impose burdens, by taxation on property, which may result in its being transferred to the State, but the citizen whose property is taken has his compensation and consideration in the security and protection which the State gives to his person and property. Again, under the same general power and against the owner's consent, real property may be taken for public use, under the law of eminent domain, but never "without just compensation." It is only under the conditions and in the manner particularly provided by law that the State can take private property without the consent of the owner, but whether taken under the law by which a revenue is provided, to support the government, or for public use, under the law of eminent domain, a benefit or consideration is received by the owner. These are the only instances and proceedings in which private property can be taken by the State. In no case can the owner be required to transfer his property without his consent or without consideration to another person. True it is that his consent may be expressed or implied. Consent may be implied where he stands by and sees another sell his property to a *bona fide* purchaser without giving notice of his title. A valu-

able consideration, in a legal sense, consists "either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Under the law of estoppel, as we have seen, one of two elements, with others, must exist, or else that law cannot be invoked. These elements are, to use again the language of Justice Helm, in Yates vs. Hurd, *supra*, that "The act of the party against whom the estoppel is sought must have gained an advantage for himself or produced some disadvantage to another. The person invoking the estoppel must have been induced to change his position." We have, then, in every case of estoppel, what is equivalent to a valuable consideration in a legal contract. Of course, one may give away his property, but the questions which arise in such a case have no application here. We have mentioned, we think, every case in which a person's property can be transferred to another. The rights of the plaintiff in error under the pleadings and evidence cannot be determined and she be deprived of the title of her property by the means or proceedings we have suggested, and it has not been contended that the defendant in error could succeed except upon the principle of estoppel. To say, where no other grounds exist, that an estoppel may be invoked when the party against whom it is sought has gained no advantage for himself or produced no disadvantage to another, is to make the title to property and other rights of the citizens to depend upon the arbitrary will and mercy of the presiding Judge instead of "the law of the land."

By the statute of descents and distribution "the husband or wife and children" are named as the "kindred," having equal rights of inheritance ex-

cept as to the division of the estate. If the relation of wife exists, the statute has made her right to inherit the husband's estate subject to no other or different conditions than exist in the case of son or daughter. The only inquiry to be made is as to the legal existence of the relation of husband and wife and parent and child. When these relations exist and the husband dies, his estate, both real and personal, "descends to the wife and children." If there are no children, etc., surviving, said estate shall "descend to and vest in" the wife as "her absolute estate." By this provision, her rights do not depend upon the administration of the estate, except as may be necessary to learn of and pay debts. No proceedings for any purpose are necessary before the title vests in her. The moment that the breath leaves the husband's body, by virtue of this statute, the title to his property becomes as absolutely vested in her as it was in him before death.

By virtue of this section of the statute, the estate of the intestate, if there are no children, without a single condition "descends to and is vested in" the widow. Her right to the estate may be lost, but it can be lost only in the way pointed out in the statute. One of the causes mentioned as a ground of divorce must exist, and suit based upon such cause must be instituted in a Court of competent jurisdiction. Jurisdiction of the person must be had and a decree of divorce rendered. Until all these provisions of the law have been complied with, the relation of husband and wife continues for all purposes.

In this case two suits for divorce were instituted, in which decrees were rendered. Both decrees were and are null and void. The parties before and after these divorce proceedings lived

separate and apart. They so lived up to the time of the husband's death. Now, suppose that, after a separation for a number of years, they had come together and continuously thereafter, until his death, lived and cohabited as husband and wife, would it be contended that his estate would not descend to her? Or, put it stronger still, these decrees being void, and she having full knowledge of all the facts existing in relation to the divorce proceedings, and with such knowledge had gone and lived with Israel as his wife, was guilty of adultery, and afterwards she had left Israel and gone back to Arthur and lived and cohabited with him as his wife until his death, will it be said that his estate at his death would not vest in her?

Suppose, again, that having lived as we have indicated, she had gone back one day or hour before his death, and he had accepted her, would a new contract of marriage, duly solemnized, have been necessary to have entitled her to the right to inherit his estate under the provisions of the statute? Of course not. While she was living with Israel she was as much the wife of Arthur as when she again returned to him, and in either case she was as much his wife as before she first left him. The statute having specifically provided how the marriage relation should be severed while the parties to it are living, no other way would be effectual to accomplish that end.

But, again, if it is insisted that the wife may forfeit her right to inherit by committing one of the offenses which the statute has made a ground of divorce, which of the grounds shall it be? The statute has made the different grounds of divorce of equal importance, whether the ground be impotency, adultery, desertion, drunkenness or extreme cruelty. The Court is bound by the same

rules of procedure, and the complaining party has a right to the same relief.

The wife, therefore, will forfeit, if at all, her claim and right to be the husband's "kindred" by being guilty of cruelty or desertion, the same as she would if she were guilty of adultery. Under our law, when a contract of marriage has been made between a man and woman, and that contract has been duly solemnized, they become husband and wife for all the purposes that are contemplated by the common law and the statutes of the State, and the rights of the wife which the law has given her, including the right to inherit, continues until the relation is dissolved by divorce, whether she is amiable or perverse, virtuous or vicious, temporate or intemperate.

Again, suppose the plaintiff in error had deserted her husband, John Arthur, and lived with Israel, as his wife, in an open state of adultery, and that thereafter Arthur applied for divorce; that a decree of divorce was rendered in his favor, which decree was void; that the plaintiff in error, however, having full knowledge of the divorce proceedings and that the decree was void, made a contract of marriage with Israel, and had the same duly solemnized; that she lived with Israel, as his wife, up to the time of his death, and afterwards (there being no children) made claim to the whole of Israel's estate. Her right to said estate being contested by the brothers or other kindred of Israel, upon the ground that the divorce in Arthur's favor was void, and that she was Arthur's lawful wife and not Israel's widow, could she have prevailed in such a case? We say most certainly that she could not. To hold that by her act *in pais* she could legalize a void judgment and decree and thereby become entitled to the benefit of the statute

of descent and distribution, would make the existence of the marriage relation depend upon the fickleness and variableness of the human will or the dictates of the animal passions instead of the law which it is supposed was alone to provide the conditions under which marriage could be contracted and solemnized and the conditions under which it can be dissolved. It would permit her by her own wrong to gain title to Israel's estate.

But suppose again, the decree of divorce being void, that the plaintiff in error and Israel, after the rendering of said decrees, had agreed to marry and had the agreement solemnized, and had, by virtue thereof, lived and cohabited as husband and wife for a number of years, and then, for some cause, Israel should have become dissatisfied with the plaintiff in error and deserted her and had gone without a decree of divorce and entered into a contract of marriage with another woman and had said contract of marriage solemnized, which one of the women would have been Israel's wife, and which one, upon his death, the heir to his estate? Under all the authorities, the question is not difficult to answer. In a contest between the two women over the estate, the first would not, in the face of a void decree of divorce from Arthur, have successfully defended her claim. On the contrary, the second would have successfully asserted that the decrees were void—that No. 1 was Arthur's wife, and, therefore, was incapable of contracting and maintaining, for any purpose, the marriage relation with Israel. Israel being a single man, he could legally marry No. 2, and, by so doing, she, as his wife, would become entitled to all the rights and privileges pertaining to the marriage relation during his lifetime and inherit his estate upon his death. Israel could have thrown her

upon the cold charity of the world at any time, and she could have had no redress against him. She, being in the wrong, having deserted Arthur, would not have been permitted to invoke the void decrees of divorce to protect her. No Court could assist her. Again, after these void decrees of divorce had been rendered, suppose John Arthur had married another woman. Upon his death, which of the two women would have inherited his estate under the statute? The Court rendering the decrees, not having jurisdiction of the plaintiff in error, its decrees could not affect her *status* as wife.

In the case of Cartwright vs. McGown, 121 Ill., 395, the fact that one Lewis married Sarah James some time early in 1843, and afterwards and on December 8, 1843, and during the life of Sarah, he married Zerelda Cacey, with whom he lived and cohabited as husband and wife to the time of his death. He had children by each of these women. Zerelda was ignorant of the marriage of Lewis with Sarah James. Sarah got a divorce from Lewis after his marriage to Zerelda. In the opinion of the Court, page 396, it is said: "Every reasonable and fair presumption will be indulged for the purpose of upholding a marriage and establishing the legitimacy of the offspring. When the cohabitation is once shown, the contract of marriage, the capacity of the parties, and, in fact, everything necessary to the validity of the marriage, in the absence of proof to the contrary will be presumed.

"The presumption of the capacity of Lewis to enter into the marriage contract with Zerelda Cacey, December 8, 1843, is overcome by proof of his prior marriage in Kentucky, and that his wife by that marriage was still living and undivorced at that time. This proof establishes the fact that the second marriage in 1843 was a nullity, conferring

no marital rights whatever. A simple marriage ceremony will not make a man and woman husband and wife. Capacity and consent are absolutely essential, but cohabitation only contingently so. (*Thompson* vs. *Thompson*, 114 Mass., 566; *Merriam* vs. *Walcott*, 61 How. Pr., 377; *Rundle* vs. *Pegram*, 49 Miss., 751.) Nor can sexual intercourse, which the parties know to be contrary to law, form even an element of marriage. *Peck* vs. *Peck*, 12 R. I., 485; *Port* vs. *Port*, 70 Ill., 484."

The State Supreme Court in this case (15 Colo., 152), however, uses the following language:

"Abandoning for years the performance of every marital obligation and duty, she waited until death had rendered such performance impossible, and then boldly hastened to seize all the pecuniary advantages conferred upon the faithful wife and bereaved widow. Under these circumstances, petitioner cannot complain if we insist upon treating the present controversy as one relating solely to property rights, unaffected by those legal considerations which give to marriage and the family their peculiar *status*, with accompanying special privileges and protection."

The foregoing conclusion, being entirely unsupported by any established principle of law, must have been reached without considering with any degree of care the first section of the statute on descent and distribution. That statute says the estate shall "descend" to "the wife and children." It has made no distinction between wife and children as to the right to inherit. Has the Court the power to supply one? The statute says the estate shall "descend" to "the wife and children," subject to the payment of debts. The statute having made the right of the wife to inherit subject only to the payment of debts, can the Court supply

something upon which the statute is silent, and thus make their rights subject to other conditions?

Again, if the wife, by refusing to perform her marital duties or by living in a state of adultery with another man, or by her immoral conduct, can be refused by the Courts her claim to inherit under the statute, why should not the same principle preclude the son or daughter? Suppose—to illustrate—that a son, as soon as he has reached that time of life when he ceases to be an expense and care, and, in a certain sense, a burden, should leave his father's house, deny the relation of father, claim he was the child of another, and disgrace himself and his father by his immoral conduct, and should so continue to the death of the father, and should then return and make his claim to a share in his father's estate. Under that law, could any Court legally refuse his claim? Or, suppose the wife and mother, at the same time the son should leave as above stated, should also desert the husband, and should live with another man in a state of adultery, deny that she was the wife of the first, but claim she was of the second, and after the death of the husband and father, the wife and son should both return and make claim under the statute to the intestate's estate, could a Court deny both claims, or, if not, could it allow the claim of the son and deny that of the mother? If so, we would be delighted to know upon what principle of law.

Again, if the position of the Court, which is indicated by the quotation last made, can, upon any grounds, be sustained, to what degree of turpitude must the wife descend before the Court would be justified in denying her right to inherit, or if she lives in a state of adultery with another man, and as his wife, how long must she continue

to so live before her right to inherit is forfeited? If it be the law, as indicated in the above opinion, that living with another man than her husband, until after the husband's death, should be taken as sufficient to justify a decree of estoppel against her, how long before the death of the husband must such conduct on her part have continued before she should be precluded from asserting her claim to inherit?

If infatuation has led her to forsake her first love and go with another, in wandering from the path of virtue, her sin and offense against the law and the home is no greater, if it be long continued, than if only for a short time. One woman's conduct in this regard may be evidence of greater depravity than the conduct of another, but adultery is not known by any milder name. Bigamy is as offensive in the eye of the law, whether the practice is sustained for a long or a short time. This being true, it seems to us that it is absurd to say, in the light of the statute, that, as affecting property rights, the Court is to determine when the conduct of the wife shall be sufficient to justify the denial to her of such rights as the statute gives to all *wives*.

Again, it is said in the same opinion (page 154) that "Public policy, as well as private interest, requires that, so far as may be consistent with fundamental principles of law, one who has attempted to profit by a supposed decree, and has exercised the resulting privilege of remarriage, should not, for the mere purpose of obtaining property, be permitted to repudiate his election, and thus demonstrate the invalidity of his second marriage, together with the unconscious adultery of his second wife and the illegitimacy of her children, if any, she have by him."

We have already shown that, by the statute, the wife and children are "kindred" equally entitled to inherit, and the moral character of neither the wife or child can be inquired into to affect rights in that regard.

We think, also, that it is well settled by all the authorities, and most clearly by the State Supreme Court (see Yates vs. Hurd, *supra*), that to *attempt* to take an advantage will never create a legal estoppel. The advantage must *actually* be gained or a disadvantage to another *actually* produced. Now, the parties seeking to deprive the plaintiff in error to the estate of John Arthur are collateral heirs. They have in no sense changed their position to their injury, nor at all, by reason of the conduct of the plaintiff in error, so that upon that ground they have no reason to complain. The Court, however, says that "One who has attempted to profit by a supposed divorce and has exercised the resulting privilege of remarriage shall not, for the mere purpose of obtaining property, be permitted to repudiate his election." If the Court means by this that the marriage in such a case is equivalent to a pecuniary benefit in other cases, we can understand what the Court means, and fully appreciate the fallacy of its position.

For the purpose, however, of the argument on this point, assuming that the evidence shows that the plaintiff in error did, in the lifetime of Arthur and after the void decrees of divorce were rendered, enter into a contract of marriage with Israel and have the same solemnized, how was she benefited? She was not the wife of Israel, and, therefore, could not legally assert any right to support from him. He could have ceased living with her at any time, and the law would have justified him in doing so. Had Israel died intestate, she could

have claimed nothing from his estate. The position in which she placed herself by her conduct was not beneficial, but seriously injurious to her. The fruit of her conduct, had the law been enforced, would have been the punishment which was affixed to the crime of adultery or bigamy. This and an upbraiding conscience and a degraded character would have been the sum total of results to her.

Again, the Court, after what we last quoted from its opinion, says that such party shall not be permitted to repudiate his election "and thus demonstrate the invalidity of his second marriage, together with the unconscious adultery of his second wife and the illegitimacy of her children, if any she have by him." While this statement of the Court contains a moral sentiment when the thoughts concerning it take no wider range than that expressed, yet, when it is tested by the principles of law underlying the domestic relations, which the wisdom of the ages has devised, the position of the Court cannot be sustained either by the authorities or upon any ground of public policy.

It is true the public is always deeply interested in every case where the sacred relation of husband and wife or parent and child are involved. As the domestic relation is at the very foundation of good government, the interest of the public is to know and see that that relation exists by certain well established and well defined principles of law and is not dependent upon the arbitrary will of any Court in assuming to exercise judicial powers. Public policy is against any means or proceedings by which the domestic relations are sought to be severed, except those expressly provided by law. The duty of the Court should always be to look into proceedings to dissolve marriage with feelings

of suspicion, and never grant a decree except upon a statutory ground and clear proof.

Justice Eliiott says, in delivering the opinion of the Court in Gilpin vs. Gilpin, 12 Colo., 519: "The dissolution of the marriage bond is against public policy. A decree of divorce will only be granted in pursuance of strict law. It cannot be granted by consent of the parties, nor upon a default, without the same strict proof required in case of a *bona fide* contest. Evidence cannot be waived, nor facts bearing upon the issue of divorce stipulated. It is the duty of all Courts having jurisdiction of divorce proceedings to be vigilant to prevent the obtaining of decrees of divorce by fraud, collusion, the admission of improper testimony, or the exclusion of competent evidence." "Society, the public, the commonwealth have an interest in the preservation of the marriage relation. In an important sense, it may well be said there are three parties to every divorce proceeding—the husband, the wife, and the State; and, in some instances, a fourth—the children."

And here again our position can best be demonstrated by illustration. Take a case like that stated by the Court, where one attempts to profit by a supposed divorce (but one which under the law, is absolutely void) by agreeing to and going through the ceremony of marrying another woman who is innocent of any evil design. He lives and cohabits with and has children by her. He has children living by wife No. 1. Upon his death intestate, which of these women, and the children of which woman, will his estate "descend to"? As to the children of wife No. 1, no question as to their having been born in lawful wedlock can be raised. They, having taken no part in the proceedings which resulted in the decree of divorce, could not

by it be precluded in their rights as heirs to the estate under the statute. They most certainly would not be estopped from alleging that the decree of divorce was void, and, being void, from asserting that the children of No. 2 were illegitimate.

Is the mother of the illegitimate children in a better position than the children? The children are unable to inherit because their mother was not the lawful wife of their father, and as the statute fails to recognize the right of the children to inherit, most certainly the mother, being an unlawful wife, would be in no better position than they. When the statute says the intestate's estate shall "descend to" the "wife and children," the lawful wife and only the children of the lawful wife are intended.

If it were otherwise, then, to be consistent and logical, this man who had married two wives could leave the second and marry an innocent third wife, and so on, until the man is exhausted or he has no more opportunities, and all the children of all the wives would be legitimate by virtue of that certain accommodating and flexible principle which the Court has been pleased to consider as a branch of the law of estoppel.

To carry that same principle to its legitimate results would be to break down the safeguards of the home and family, and by indirection legalize polygamy and create a legal status for the mistress of the unfaithful husband. It must appear, therefore, that from whatever view this case can be considered, the defendant in error should not, by reason of anything alleged in his supplemental answer, or that was given in evidence, be permitted to defeat the claims of this plaintiff in error as the sole heir to the estate of John Arthur, deceased.

There is no provision of the common or statute law that would justify it. As it would be necessary in order to sustain the doctrine of the State Court to unsettle the well established principles of law which exist for the security and protection of the domestic relations, in no sense could it be sustained by any considerations of public policy.

THE MEANING OF DUE PROCESS OF LAW.

Section 1, Article XIV., of the Constitution, provides that no State "shall deprive any person of life, liberty or property, without due process of law." It seems to be agreed that "due process of law" is equivalent in meaning to "law of the land." This constitutional provision stands as an effectual and complete barrier to the taking of property against the consent of the owner, unless it is taken by virtue of some positive law, either common or statutory. Judge Cooley, in discussing this subject, has said (Story on Constitution, Section 1943):

"It has been said that the meaning of the words is the same, in legal effect, with another phrase, which perhaps is even more often employed by legal writers and by jurists, having been taken from the celebrated twenty-ninth chapter of King John, where it was promised as the security of freemen. We refer to the phrase 'law of the land.' Admitting this identity of meaning, however, we are no nearer an understanding of the purpose and effect of this guaranty than before. What is 'the law of the land'? It cannot be the common law, merely. Statute law is, in the highest sense, the law of the land; and the legislative department, created for the very purpose of declaring, from time to time, what shall be the law, possesses ample powers to make, modify and repeal, as public policy or public need shall demand."

But not only must there be some positive law in force by which her estate is taken, but the proceedings which are provided by law for such cases must be pursued and no other or different. If it be true that the plaintiff in error had in the lifetime of Arthur lived in an open state of adultery with Israel and been guilty of bigamy, then the only way she could have been proceeded against was by indictment by a grand jury in a Court of competent jurisdiction, and, following that, she would have been entitled to all the protection during the whole proceedings against her, to the final conviction or acquittal which is accorded a defendant in a criminal case.

THE JUDGMENT IS, IN EFFECT, A PUNISHMENT FOR A CRIME.

In our form of government, it is alone within the power of the legislative branch to enact such laws as may be prudent and just to guard and protect these sacred relations. The Legislature alone can provide for the distribution of the estate of deceased persons; for the regulation of the property and other rights pertaining to the marriage relation; to provide what shall be criminal offenses, and provide the punishments therefor. Concerning all these matters, the Courts have nothing to do. The Legislature of Colorado, in its wisdom, provided how the marriage relation shall be created and for what causes and in what manner that relation shall be dissolved.

The marriage relation continues until a dissolution, by a decree of divorce, for one of the causes and in the manner provided by statute. Until a decree of divorce is obtained in a Court having jurisdiction, the relation continues to exist. If the relation exists at all, it is for all pur-

poses. If the wife can be prosecuted as such for adultery or bigamy during the life of the husband, she certainly will be the distributee of his estate after his death. If the Legislature intended that her right of inheritance should depend upon conditions, the Legislature, which alone has the power, should have specifically provided what the conditions were. If the law is imperfect and is not such as to secure absolute justice in all cases, it is, nevertheless, the duty of the Court to enforce the law as it is found, and not to give it a strained construction to meet particular cases. The value of law is in its certainty. The power to cure defects in the law rests solely with the legislative branch of the government. The Legislature having provided specific penalties for adultery and bigamy, no Court has the right or power to enforce any other or different penalty.

The statutes of the State denounce bigamy as a felony and adultery as a misdemeanor, and to each of said criminal offenses have been added penalties which shall be inflicted as punishments for their commission.

Now, by the defense in this case, it is not questioned that the petitioner was John Arthur's lawful wife and is his lawful widow, but, by reason of the commission by her of what the law has denounced as a crime and provided a punishment for, it is proposed to inflict, by an indirect proceeding, another and different punishment than that which the law has provided.

John Arthur, dying without children, left the petitioner the sole heir to his estate. Upon his death the title, subject to the payment of his lawful debts, became, by operation of law, vested in her. The fact that she committed the crime of bigamy or adultery could not have the effect to divest her

of that estate. The law knows of no proceedings by which said estate, without her consent, could be arbitrarily transferred from her to the brother and other surviving relatives of John Arthur.

THE JUDGMENT IS IN VIOLATION OF THE CONSTITUTIONAL GUARANTIES.

The consitutional guaranties are limitations upon the powers of the judicial as well as the legislative and executive branches of the government.

In Den vs. Hoboken Co., 18 How., 272, in discussing the fifth amendment, Justice Curtis, in delivering the opinion of the Court, said: "The Constitution contains no description of those processes which it is intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."

In *Ex parte* Mulligan, 4 Wal., 2, Justice Davis, at page 125, in delivering the opinion of the Court and speaking of the safeguards of the Constitution, said, "Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the writ of *habeas corpus*."

In the chapter on the fourteenth amendment in Story on the Constitution (5th Edition) Vol. II, Section 1945, Judge Cooley says, that,

"Life, liberty and property are placed under the protection of known and established principles, which cannot be dispensed with either generally or specially, either by Courts or execu-

tive officers, or by legislators themselves. Different principles are applicable in different cases and require different forms and proceedings. In some they must be judicial; in others, the government may interfere directly and *ex parte;* but due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."

We assume, then, that, without question, the fourteenth amendment, as well as other constitutional limitations, apply equally to the three branches of the government.

As we have already observed, the law-making power exists alone in the Legislature. Except as provided by the Constitution, the Legislature of the State is without limitation as to its power to enact such laws as it may consider necessary for the protection and general good of the people. Having, however, by legal enactment, particularly designated what act shall be criminal and what punishment shall be administered for the commission of such act, the particular punishment known to the law at the time of the commission of the offense, and no other, can be inflicted. The Legislature cannot change it. More than that, the accused must be put on trial, either by criminal information or indictment. In the case of Mrs. Israel, as the law, at the time she is charged with having committed adultery or bigamy, did not provide for criminal informations, she could only be prosecuted by indictment.

The decree of the State Court is based upon the commission of an offense which the law de-

nounces as criminal—that is, because of the offense, it is adjudged that the plaintiff in error shall not be permitted to take and enjoy that which the law of descent and distribution says is her sole and absolute property. In other words, that she shall forfeit her right to said estate.

This decree is in effect as much a punishment for the commission of said offense as if the judgment had been to pay a fine or had directed her confinement in prison.

THE DECREE IS IN ITS NATURE EX POST FACTO.

Section 10, Article I., of the Constitution provides that "no state shall pass any bill of attainder or *ex post facto* law," etc. Suppose that the Legislature of Colorado, after the death of John Arthur, had passed an act to the effect that every wife who should be guilty of adultery or bigamy should thereby forfeit all right to the estate of her husband which she would otherwise have under and by virtue of the statutes of descent and distribution, no one would claim for one moment that such a law could relate back to and be enforced against her for such offenses committed before the passage of the act. It would be clearly *ex post facto* and repugnant to Article II., Section 10, of the Federal Constitution, as well as Section 11 of the bill of rights of the Constitution of Colorado.

In Calder vs. Bull, 3 Dallas, 390, an *ex post facto* law is defined as follows:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2d. Every law that aggravates a crime and makes it greater than it was when committed.

3d. Every law that changes the punishment and inflicts greater punishment than the law annexed to the crime when committed.

4th. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the effender.

Cooley on Constitutional Limitations, p. 319.

Although the Constitution aims to prohibit *ex post facto* laws in criminal cases, it cannot be evaded by giving a civil form to that in substance criminal.

Cummings vs. Missouri, 4 Wall., 277.

In the case of Cummings vs. Missouri, the following facts existed: Cummings was a Catholic priest. He had committed some act of disloyalty to the government during the rebellion. The Constitution of Missouri provided a test oath which all persons should take before they could vote, hold office, serve as a juror, act as a priest, or do certain other things mentioned. Cummings refused to take the oath, but continued to exercise and perform the duties of priest. He was indicted and convicted in one of the Courts of that State. The Supreme Court of the United States granted a writ of *habeas corpus*, which brought before that Court the test oath provision of the Missouri Constitution. Justice Field, in delivering the opinion of the Court, among other things, said:

"Some of the acts at which the oath is directed constituted high offenses at the time they were committed, to which, upon conviction, fine and imprisonment or other heavy penalties were attached. The clauses which provide a further penalty for these acts are also within the terms of the defini-

tion of an *ex post facto* law—'they impose additional punishment to that prescribed when the act was committed.'

"And this is not all. The clauses in question subvert the presumptions of innocence and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable."

* * *

"The provisions of the Constitution of Missouri accomplish precisely what enactments like those supposed would have accomplished. They impose the same penalty without the formalities of a judicial trial and conviction; for the parties embraced by the supposed enactment would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition. Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode producing the same result must equally fail. *The provisions of the Federal Constitution, intending to secure the liberty of the citizen, cannot be evaded by the form in which the power of the State is exerted.* If this were not so, if that which cannot be accomplished by means looking directly to the end can be accomplished by indirect means, the inhibition may be evaded at pleasure. No kind of oppression can be named against which the framers of the Constitution intended to guard, which may not be effected."

Again, in Story on the Constitution, Section 1949, Judge Cooley, in the discussion of this subject, said:

"In all the States, the accused is entitled to a speedy and public trial by an impartial tribunal; to have the presence, advice and assistance of counsel

in his defense; to be confronted with the witnesses against him, and he is not to be compelled to give evidence against himself. All these requirements are made fundamental and indispensable by the State Constitutions; and however much the forms of proceeding or the nature of the tribunal may be changed, due process of law must necessarily include each and all of these requisites. And if conviction follows, the prisoner is entitled to demand that the precise punishment the law has prescribed for his case, and no greater or different, shall be awarded. Unless the law leaves a discretion to the officer, he can exercise none whatever; even a milder punishment than the prescribed penalty, if different in its nature, and not simply constituting a part of that fixed by law, would be wholly inadmissible and illegal."

Fletcher vs. Peck, 6 Cranch, 137.

In the case of *Ex parte* Mulligan, 4 Wal., 2, Justice Davis, speaking for the Court, at page 118, said:

"No graver question was ever considered by this Court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. The power of punishment, is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country or endangered its safety. By the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers or the clamor of an excited people."

The facts from which this celebrated case

arose are familiar to the Courts and the profession. Milligan was charged, before a military commission organized under an act of Congress—

1st. With having been a party to a conspiracy against the government of the United States during the rebellion;

2d. With having afforded aid and comfort to the rebellion;

3d. With having incited an insurrection;

4th. Disloyal practices, and—

5th, Violation of the laws of war.

All of which acts are alleged to have been committed in States where the Federal and State Courts were unobstructed and the laws were enforced. By the opinion in the Mulligan case, it is settled, and, it is to be hoped, for all time, that "An accused person must be put on trial on some regular and established form of accusation," and a trial had according to the proceedings in criminal cases, and that a judgment obtained otherwise, by which liberty is restrained or life or property taken as a penalty, cannot be successfully defended.

We think it must appear from the reasons and authorities already presented that an estoppel can not in this case be sustained upon any ground. The adverse claimants, who are represented by defendant in error, cannot claim, by reason of anything appearing in the record, that they have in any way changed their position by reason of Mrs. Israel's conduct or representations. The decree, therefore, has nothing to support it. It being a civil action, the Court's duty was to inquire who the "kindred" were, and then distribute the property according to the provisions of the statute. As it was, the Court assumed to transfer the title to

the estate of John Arthur, deceased, from the widow to the "next of kin," without any consideration passing to her, but solely because she had violated the criminal laws of the State.

In Davidson vs. Board of Administrators, etc., 96 U. S., 97, Justice Miller, speaking for the Court, said:

"It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vestedin B., would, if effectual, deprive A. of his property without due process of law within the meaning of the constitutional provision."

Can the judicial department of the government in this regard accomplish by a decree what the Legislature is forbidden to do under its law-making power?

Whatever the character of the offense which a citizen has committed, the law having fixed a certain penalty, that penalty and no other can he be required to suffer. This is so whether the offense be treason or disloyalty to the government or to the marriage relation.

Now, suppose that, after the death of Arthur, the Legislature had passed an act which provided that before any wife could take the estate of her husband under the statute of descent and distribution, she should first be required to take an oath, before the Probate Judge in whose Court the husband's estate was being administered, that she had not during his lifetime been guilty of adultery or bigamy. Would it be contended for a moment, in the light of the Cummings case, that such an act could be enforced to defeat her claim to the estate? And, again, as Chief Justice Marshall said in the Fletcher case, "The Legislature is,

then, prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by *some previous law* to render him liable to that punishment," and this is so whether the act shall provide that the estate be forfeited to the government or transferred to a private individual. As well in the one case as in the other, the taking of the property would be a punishment inflicted for the commission of a crime. In the light of the principles so well established by this Court, what have we in this case? John Arthur in his lifetime and at his death and the plaintiff in error were husband and wife. The statute says (there being no children) that upon his death his estate shall "descend to and vest in her as her absolute estate." During their married life and at his death, the law provided that adultery should be punished by fine and imprisonment in the county jail, and that bigamy should be punished by a fine and imprisonment in the penitentiary, and there were no other or different punishments provided for either offense. If the Legislature is powerless to provide a law by which a further punishment in the nature of a forfeiture of her estate can be inflicted, can such additional punishment be legally accomplished through the exercise of judicial power? To us, any such contention is too absurd to discuss. It matters not how the judicial power may attempt to accomplish such an end, the effort would or should be futile. To say that the law of equitable estoppel can be invoked for such a purpose is to make it sufficiently flexible to meet what the caprice or passion of a corrupt or revengeful judge might desire.

In speaking of the opinion of the Court in 15 Colo., that Court, in the last expression of its views

upon the law governing this case, said: "As before stated, we regard the former opinion as controlling in *this particular* litigation." The expression is unfortunate, and yet seems not to have been used without consideration. It is unfortunate because it announces legal principles which it says shall be confined in their application to this particular case, and the fact that the Court has so limited their application indicates its determination not to be bound thereby in any similar litigation in the future. We have always understood that the beneficence of the law is in its certainty and universality. When law is made by a Court to fit a particular case, the law is vicious, and the administration of justice becomes dangerous and uncertain.

In conclusion, we beg to submit to your Honors the great importance of the questions involved in this record. We submit that while the decision of the honorable Court may be of much importance to the plaintiff in error individually, to sustain the judgment of the State Supreme Court, a principle of law, new to our jurisprudence and dangerous to domestic relations and property rights, must be established.

The motion should be denied.

Respectfully submitted,

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LAW ASSOCIATION
OF
PHILADELPHIA.

APPENDIX.

STATUTES OF COLORADO IN FORCE BETWEEN 1870 AND 1880.

Descents and Distributions.

Section 1. Whenever any person having title to any real estate, or property having the nature or legal character of real estate, or personal estate, undisposed of or otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts, in the following course and manner, namely:

If such intestate leave a husband or wife and children, or the descendants of any children, him or her surviving, one-half of such estate shall descend to such surviving husband or wife, and the residue thereof to such surviving children and descendants of children as hereinafter limited. If such intestate leaves a husband or wife, and no children nor descendants of any child, then the whole of the estate of such intestate, real and personal, shall descend to and vest in such surviving husband or wife as his or her absolute estate, subject to the payment of debts as aforesaid.

Dower and tenancy by courtesy are abolished, and neither husband nor wife shall have any share in the estate of the other save as herein provided.

Except in the cases above enumerated, the estate of every intestate shall descend and be distributed as follows:

First—To his children surviving, and the descendants of his children who are dead, the de-

scendants, collectively, taking the share which their parents would have taken if living.

Second—If there be no children nor their descendants, then to his father, mother, brothers and sisters, and to the descendants of brothers and sisters who are dead (the descendants, collectively, taking the share their parent would have taken if living), in equal parts.

Third—If there be no children nor their descendants, nor father, mother, brothers, sisters, nor descendants of deceased brothers or sisters, nor husband nor wife living, then to the grandfather, grandmother, uncles, aunts and their descendants (the descendants taking, collectively, the share of their immediate ancestors), in equal parts.

Fourth—And if none of the relatives above enumerated be living, then to the nearest lineal ancestors and their descendants (the descendants, collectively, taking the share of their immediate ancestor), in equal parts.

Divorce and Alimony.

Section 1. In any case in which a marriage has been or hereafter may be contracted and solemnized between any two persons, and it shall be adjudged, in the manner hereinafter provided, that either party at the time of the marriage was and continued to be impotent naturally, or that he or she had a wife or husband living at the time of such marriage, or that either party has committed adultery subsequent to the marriage, or has willfully deserted and absented himself or herself from the husband or wife, without any reasonable cause, for the space of one year, or that a husband has willfully deserted and absented himself from his wife and departed from this territory, without any inten-

tion of returning, or that either party has been guilty of habitual drunkenness for the space of two years, or been guilty of extreme cruelty, or been convicted of felony or other infamous crime, it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract, but no such divorce shall in any wise affect the legitimacy of the children of such marriage, except in case where the marriage shall be declared void on the ground of a prior marriage.

Criminal Code.

Bigamy.

Section 122. Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive.

If any person or persons within this territory, being married, or who shall hereafter marry, do at any time marry any person or persons, the former husband or wife being alive, the person so offending shall, on conviction thereof, be punished by a fine not exceeding $1,000, and imprisonment in the penitentiary not exceeding two years.

It shall not be necessary to prove either of the said marriages by the register or certificate thereof, or other record evidence, but the same may be proved by such evidence as is admissible to prove a marriage in other cases; and when such second marriage shall have taken place without this territory, cohabitation in this territory, after such second marriage, shall be deemed the commission of the crime of bigamy, and the trial in such cases may take place in the county where such cohabitation shall have occurred.

Nothing herein contained shall extend to any person or persons whose husband or wife shall have been continually absent from such person or persons for the space of five years together, prior to the second marriage, and he or she not knowing such husband or wife to be living within that time.

Also nothing herein contained shall extend to any person that is or shall be, at the time of such second marriage, divorced by lawful authority from the bonds of such former marriage, or to any person where the former marriage has been by lawful authority declared void.

Adultery.

Section 124. Any man or woman who shall live together in an open state of adultery or fornication, or adultery and fornication, every such man and woman shall be indicted, and, on conviction, shall be fined in any sum not exceeding $200 each, or imprisoned in the county jail not exceeding six months.

This offense shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy, and for a second offense, such man or woman shall be severally punished twice as much as the former punishment, and for a third offense, treble, and thus increasing the punishment for each succeeding offense; *Provided, however*, That it shall be in the power of the party or parties offending to prevent or suspend the prosecution, by their intermarriage, if such marriage can be legally solemnized, upon the payment of the costs of such prosecution.

OPINION, ISRAEL VS. ARTHUR, 7 COLO., 5 TO 12, HELM J.

This action was brought by plaintiff in error in the Court below for the purpose of establishing her right to the estate of John Arthur, deceased, as sole surviving heir at law.

Plaintiff was married to the said Arthur in 1859, there was no issue from the marriage, and, unless divorced, plaintiff was his wife at the date of his decease, and entitled, under the statute, there being no will, to inherit his entire estate.

Defendants in the Court below were the deceased's brother, who was also administrator of the estate, and certain nephews and nieces, who were interested therein as heirs, provided plaintiff failed in establishing her right thereto.

At the trial the Court admitted, over plaintiff's objection, the records and judgments in two divorce actions brought against her by the said John Arthur during his lifetime.

The first of said actions was instituted in the Probate Court of Larimer County, and on February 9, 1875, a decree of divorce was granted therein.

The second was brought in the County Court of said county, and on June 12, 1877, a similar decree was again entered.

Two of the errors assigned attack the correctness of the Court's rulings admitting in evidence the records of these divorce suits.

The Code of Civil Procedure did not become a law until October, 1877, and, consequently, both of these actions were brought and the service of process therein was attempted under the practice prevailing in Colorado before that instrument was adopted.

Each of the records admitted in evidence shows on its face that the summons was issued and returned on the same day, and that the Court relied, for its jurisdiction over the person of the defendant, upon an attempted service of notice by publication.

In obtaining constructive service in this way, a strict compliance with the method pointed out by statute must be observed.

While experience demonstrates that this mode of giving a Court jurisdiction of the person is necessary in many instances, yet Courts are jealous of abuses in the application thereof.

They tolerate the omission of no material step required by law in connection therewith.

The statute at the time these actions for divorce were commenced commanded the usual exertion on the part of the Sheriff to serve the summons, notwithstanding the proceedings by publication. Revised Statutes of Colorado, Chapter XIII., Section 8.

And it has been held by this Court that in divorce suits, under that practice, "a return *non inventus* before the return day of the writ, would not support a notice by publication, and left the Court without authority to proceed to judgment." *Clayton et al. vs. Clayton, Heir, etc.*, 4 Colo., 410; *Vance's Heirs vs. Maroney, etc.*, 4 Colo., 47; *Palmer vs. Cowdry*, 2 Colo., 6.

Neither the Probate or the County Court, in these actions, had obtained jurisdiction over the person of the defendant; both were without authority to "proceed to judgment," and, consequently, both decrees were absolutely void.

But it is argued by the counsel—First, that these decrees are not subject to collateral attack in this proceeding.

Second—That in any event the finding of the County Court in the latter, that "due service by publication has been had on said defendant," is conclusive upon the question of service, and fortifies *that* decree against such an attack.

There is some conflict of authority upon the question as to whether, in an attempt to secure constructive service by publication, any presumption of regularity will be indulged in, the record being entirely silent.

It has been held that a compliance with the material requirements of the statute must appear on the face of the record.

On the other hand, Courts of high authority have announced that such presumptions are applicable to the proceedings of the Courts of superior jurisdiction, whether such proceedings rest upon actual or constructive service.

It is unnecessary, however, for us, in the case at bar, to determine this question.

For where the record is not silent on this subject, and where it affirmatively appears therein that the Court did not have jurisdiction of the person, certainly no such presumption can be indulged in. (*Clayton vs. Clayton, supra; Gilpin vs. Page*, 18 Wallace, 336.)

And the finding in one of these records that due service of process had been had is not conclusive.

We are not prepared to accept, without qualification, the doctrine upon this subject stated in *Goudy et al. vs. Hall*, 30 Ill., 116, relied upon by counsel for plaintiff in error. The opinion in the case *seems* only *prima facie* evidence of that fact, and may be attacked in a collateral proceeding.

Interpreted or understood without condition, it modifies the beneficent rule that judicial records import absolute verity.

And its effect would be to subject them in many instances to collateral attack, where, upon principle and authority, they should be held conclusive.

In *Harris vs. Lester et al.*, 80 Ill., 307, the Court use the following language with reference to a similar finding of service by the Court that tried the cause: "In all collateral proceedings, we entertain no doubt, such finding is sufficient evidence of service by publication as to defendants, nothing appearing in the record to the contrary, and to warrant the decree, as in cases of regular notice by publication."

This may fairly be said to modify the position taken in the *Goudy vs. Hall* case, and is, we think, in accord with the weight of authority.

It sanctions the view that where, as in the case under consideration, the record expressly cites the facts relied upon as constituting service, and those facts show clearly that no jurisdiction of the person was obtained thereby, it would be absurd to pronounce conclusive and binding a declaration therein that legal service was had.

The record stultifies itself and is not protected by the rule that such findings are decisive of the question in collateral proceedings.

The divorce records before us were offered by the parties to be directly and materially benefited thereby, and we are clearly of the opinion that they were subject to collateral investigation.

In 1877 the Legislature passed the following act, which was approved by the Governor on the first day of March, viz.:

"WHEREAS, The Probate Courts of certain counties have heretofore exercised jurisdiction in divorce cases, and various parties have obtained decrees of said Courts granting divorces with the belief that the Courts possessed jurisdiction in relation to said matters; and

"WHEREAS, Doubts exist as to the validity of said proceedings, and as to the right of said Courts to exercise jurisdiction in the said matters;

"THEREFORE, Be it enacted as aforesaid: 'That all proceedings of any Probate Courts, the jurisdiction of which is, or may be, questioned as aforesaid, heretofore had in any case, so far as the same or any part thereof relate to the matters aforesaid, and to the jurisdiction of the Courts therein, be, and the same are, in all respects legalized.'" General Laws, Section 925.

It was generally supposed that the Probate Courts of the Territory of Colorado had no jurisdiction in divorce proceedings; that such actions could only be brought and determined in the District Court.

The correctness of this supposition is questionable in view of the chancery jurisdiction conferred upon Probate Courts by the amendment to the Territorial Organic Act, approved March 2, 1863. Revised Statutes, page 38, Section 3.

But the State Legislature, as appears from the foregoing act, shared sufficiently in the general belief on the subject to attempt to neutralize the effect of the supposed errors in question.

Counsel for defendants in error contend that this legislative enactment rendered valid and binding the decree of the Probate Court in 1875.

They argue that, although in that case the Court may have no jurisdiction, either of the

subject-matter or of the person of the defendant, this act was intended to and did cover and cure these defects.

Our State Constitution provides that the General Assembly shall pass no local or special laws for granting divorces.

This provision deprives the Legislature of the authority existing under the territorial organization to divorce husband and wife by statute.

It still has power to declare what shall be necessary to constitute a valid marriage and what grounds shall be sufficient to authorize a divorce.

It may also provide the method of procedure by the Courts upon application thereto for such relief. But it cannot, under this constitutional provision, assume judicial powers and sever the bonds of matrimony in a given case.

If the Legislature, in 1877, could not do this directly, could it accomplish the same result indirectly? Could it, by statute, give validity to the decree of a Court which was absolutely lifeless and void for want of jurisdiction over the person against whom it was rendered?

The Legislature may validate judicial proceedings when the statute is only in aid thereof and tends to support the same, by precluding parties from taking advantage of error or irregularities which do not affect their *substantial rights.*

But it cannot, by retrospective legislation, give validity to previous judicial proceedings, which were void for want of jurisdiction over the parties.

Two reasons may be assigned for this inhibition: *First*—Because it would be an exercise of judicial power not contemplated by our Constitution (see Article III.). *Second*—Because it would operate to deprive parties of their "day in Court"; property rights might be divested without notice

to those interested and without giving them the opportunity to be heard.

See S. 25, Bill of Rights; *Mason vs. Eldred*, 6 Wallace, 239; Cooley on Const. Lim., 107, and cases cited in notes.

A decree of divorce generally affects the property rights of the parties as well as their marital relations. Israel vs. Arthur, 6 Colo., 85.

Upon this question we cannot doubt or hesitate.

They (the Legislature) can no more impart binding efficacy to a void proceeding than they can take one man's property from him and give it to another.

Indeed, to accomplish the one is to accomplish the other. *McDaniel vs. Correll*, 19 Ill., 226.

If it was competent for the Legislature to make this declaration, then it was competent for it to have declared that to be a judgment which before was no judgment, and binding upon the party against whom it was rendered—when before he was not bound at all—for such is the direct result.

It is a proposition not to be discussed at this day, that the Legislature has no such power. *Nelson vs. Rountree*, 23 Wis., 370. See *Pryor vs. Downey;* 50 Cal., 403; Wade on Retroactive Laws, Section 164.

The statute of 1877 cannot be held to cure the defect of want of jurisdiction over the person of defendant in the divorce action of 1875.

It is doubtful if the Legislature intended this statute to produce any such consequence.

The act itself, viewed in the light of the preamble thereto, seems to indicate that it was simply the intention to remedy the defect of want of jurisdiction over the subject-matter, where the

Court had complied with the law in obtaining jurisdiction over the person.

It is unnecessary for us to consider the constitutionality of the act, in this view of its supposed design and operation, further than is necessarily implied by the foregoing discussion.

The records of the divorce proceedings should have been excluded by the Court; for error in admitting them, the judgment must be reversed and the cause remanded.

We may deplore the effect of these conclusions in this particular case.

But the consideration of hardship to these defendants therefrom must not be permitted to influence our judgment upon the question presented.

In the language of Mr. Justice Elbert, in *Clayton vs. Clayton, supra*, "It cannot avail against the greater hardship of the concluding parties by adjudications of their most sacred rights in proceedings of which they have no notice and to which they have never agreed.

Reversed.

OPINION, ARTHUR VS. ISRAEL, 15 COLO., 147–155.

Chief Justice Helm delivered the opinion of the Court.

The present controversy has been once before submitted to this Court for adjudication.

There was then, however, nothing in the record to show that Mrs. Israel, after deserting Arthur and prior to the divorce decrees, had been guilty of immoral conduct, neither was there anything, aside from these decrees, to indicate that she had not, up to the commencement of the proceedings therefor, conducted herself as a good, true and affectionate wife, or that subsequent to the entry thereof and with knowledge of the same, she had,

during Arthur's lifetime, remarried and lived and cohabited with another man as his wife.

The single question then presented, wholly unembarrassed by any of these considerations, was whether or not the decrees, which were void because the records showed affirmatively that there was no jurisdiction over the person, should have been received in evidence and given the same force and effect as if valid and binding.

The Court held that they should not; and, for error in their admission, reversed the judgment.

The record now before us, on the contrary, discloses a voluntary acceptance by petitioner of the privileges resulting from the divorce decrees, as well as antecedent conduct on her part, that is highly reprehensible from both a legal and a moral standpoint.

That petitioner's purpose was to secure the estate of deceased was known then as now; but the question as to whether she may accomplish this purpose obviously rests at the present time upon very different considerations from those formerly brought to our attention.

We cannot accept the assertion of counsel for defendant in error that the decision of the Court upon the former case is decisive of the present review.

We still adhere to the opinion that the decrees in question were void and not merely voidable; but, assuming such invalidity, and giving to the declaration of this Court reciting that fact all the force and effect of a final adjudication thereof, we feel warranted in holding that petitioner's right to the estate of Arthur may still be inquired of.

It is to be hoped, for her sake, that the conduct of petitioner is not correctly set forth in the supplemental answer; but the averments of this

pleading in that behalf are, by the demurrer, temporarily confessed, and, for the purposes of the present decision, must be treated as true.

The question, therefore, *now* presented for determination may be stated as follows: When the wife without cause deserts her husband and home and for years lives in adultery with another man, and afterwards, upon learning that a divorce has been obtained by her deserted husband, causes a marriage ceremony with her paramour to be solemnized, and continuously lives and cohabits with him as his wife, may she, upon the subsequent decease of her abandoned husband, take advantage of the fact that the divorce decree is void for want of proper service of process and successfully assert against other heirs her right, under the statute of descents and distributions, to the deceased's estate, as his widow?

An affirmative answer to this question would be so shocking to good morals, to sound public policy and to the simplest principles of justice that we shall decline to give it unless coerced into doing so by cogent and firmly established rules of law.

As a matter of law, petitioner must, under the circumstances, be presumed to have known before Arthur's death that the divorce decrees were invalid; and it is fair to assume that such, in fact, was the case, as, besides the grounds upon which the legal presumption rests, she so promptly after that event asserted their invalidity.

Had she properly challenged those decrees during the lifetime of Arthur, she would have incurred the hazard of a restoration of conjugal relationship, or of his procurement of a binding divorce.

Either of these results was evidently objectionable to her, and both were carefully avoided.

She voluntarily elected to postpone action at such a time as she might secure all the benefits of the marriage contract without discharging any of its burdens.

Abandoning for years the performance of every marital obligation and duty, she waited until death had rendered such performance impossible, and then boldly hastened to seize all the pecuniary advantages conferred by law upon the faithful wife and bereaved widow.

Under these circumstances, petitioner cannot complain if we insist upon treating the present controversy as one relating solely to property rights, unaffected by those legal considerations which give to marriage and the family their peculiar *status*, with accompanying special privilege and protection. *Zoellner vs. Zoellner*, 46 Mich., 511.

But if the divorce decrees receive the same treatment as judgments or decrees in ordinary controversies relating to damages or property, petitioner's action must fail, for one who accepts and retains the fruits of a void judgment cannot afterwards repudiate his action and take advantage of its invalidity. *Water Co. vs. Middaugh*, 12 Colo., 434, and cases cited; *Duff vs. Wyncoop*, 74 Pa. St., 300.

The foregoing principle has numerous other salutary applications, as, for instance, that one having accepted the benefits of an unconstitutional law cannot, as a general rule, rely upon such unconstitutionality as a defense, even though the invalidity has been adjudicated in another suit.

Daniels vs. Tearney, 102 U. S., 415, and cases.

Also that a corporation, having exercised the privilege of its franchise, when sued for its negligent or malicious tort, shall not successfully invoke

as a defense the plea of *ultra vires*. *Bank vs. Graham*, 100 U. S., 699.

And in many cases the same inhibition applies after the benefits of otherwise binding corporate contracts have been enjoyed. *Railway Co. vs. McCarthy*, 96 U. S., 258.

We discover, upon principle, no sufficient reason why petitioner's conduct in the premises should not produce just as effective an estoppel as if she had received the proceeds of a void judgment for money.

By her subsequent marriage with Israel during Arthur's lifetime, she accepted, so far as was in her power, the benefits and privileges of the divorce decrees.

The fact that she did not then know that those decrees were void is a matter of no more consequence than is the ignorance in this respect of one who, knowingly in all other particulars, receives the fruits of an ordinary void judgment at law.

That, at the time of her marriage with Israel, she understood the decrees to be valid, is, if true, only an additional earnest of her acquiescence in the result, and sincerity in accepting and taking advantage of the benefits supposed to follow.

Besides, had she believed them to be void, her obliquity would be even deeper than it is, because to her other alleged offenses would be added that of intentional fraud upon Israel, who may have thought that he was contracting a valid marriage.

We are unmindful of the fact that the analogy between accepting the fruits of void judgments at law and accepting the pecuniary benefits, if any there be, together with the privileges of void divorce decrees, is not perfect in all respects.

But the importance and justice of recognizing an estoppel in the latter case may be far more weighty than in the former.

The immediate parties are not alone concerned. The public is always, and other individuals are usually, profoundly interested.

Public policy, as well as private interest, requires that, so far as may be consistent with fundamental principles of law, as one who has attempted to profit by a supposed divorce, and has exercised the resulting privilege of remarriage, shall not, for the mere purpose of obtaining property, be permitted to repudiate his election, and thus demonstrate the invalidity of his second marriage, together with the unconscious adultery of his second wife and the illegitimacy of her children, if any she have by him.

Were petitioner attempting, in the light of the present record, to have the divorce decrees held void, her attempt would be futile.

And the fact that upon another and different record this Court was induced to declare such nullity is, as already suggested, not conclusive to her right to the property in question.

It clearly appears, from the admitted averments of the supplemental answer, that petitioner herself is responsible for the failure of defendant to sooner plead in bar the facts which operate in the nature of an estoppel by conduct; and since, if these matters had been known in the first instance, petitioner would not, for the purpose of securing Arthur's estate, have been permitted to show the invalidity of the divorce decrees, and we unhesitatingly conclude that she should not now be allowed to take advantage of such invalidity, in order to accomplish the same result.

The application of a doctrine analogous to that of equitable estoppels to cases which, in essential particulars, strongly resemble the one at bar, is by no means a novelty. *Ellis vs. White*, 61 Iowa, 644; *Garner vs. Garner*, 38 Ind., 139; *Prater vs. Prater*, 87 Tenn., 78; *Duke vs. Reed*, 64 Tex., 705; *Odiorne's Appeal*, 54 Pa. St., 175; *Bourne vs. Simpson*, 98 Mon., 454; *Baily vs. Baily*, 44 Pa. St., 274; *Richeson vs. Simmons*, 47 Mo., 20; *Yorston vs. Yorston*, 32 N. J. Eq., 495; *Sedlak vs. Sedlak*, 14 Ore., 540; *Nichols vs. Nichols*, 25 N. J. Eq., 60.

In two or three of the foregoing cases the principle of estoppel was applied where wives had abandoned their husbands and formed adulterous relations with other men, or had simply renounced the marriage tie and forsaken the marital obligations, but where, in fact, no divorce proceedings were instituted.

In at least two of the others the learned Judges who prepared the opinions dwell upon *laches* as well as acquiescence.

These decisions are, in the main, well considered, and we have no disposition to reject the particular reasons, so far as applicable, given in support thereof, but we prefer to rest our conclusion especially on the specific grounds hereinbefore considered.

Petitioner's demurrer to the supplemental answer should have been overruled.

The judgment of the Court below is accordingly reversed, and the cause remanded for further proceedings.

Reversed.